

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HODELL-NATCO INDUSTRIES, : CASE NUMBER
INC., : 1:08 CV 2755
Plaintiff :
:
vs. :
:
SAP AMERICA, INC., et :
al., :
Defendants :
:

Friday, November 2, 2012

Videotaped videoconferenced

deposition of BROOKS LOUIS HILLIARD, CMC, CCP,
taken at the law offices of Drinker Biddle &
Reath LLP, One Logan Square, 18th and Cherry
Streets, Philadelphia, Pennsylvania 19103,
beginning at 9:09 a.m., before Cheryl L.
Goldfarb, a Registered Professional Reporter
and an approved reporter of the United States
District Court.

	Page 2		Page 4
1	APPEARANCES:		
2	KOEHLER NEAL LLC	1	THE VIDEO TECHNICIAN: We're now
3	BY: P. WESLEY LAMBERT, ESQUIRE	2	on the record.
4	LAURA MYERS, ESQUIRE	3	My name is Russ Strain, from
5	1301 East Ninth Street	4	Veritext Court Reporting Company. The
6	Cleveland, Ohio 44114	5	date today is November 2nd, 2012. The
7	216.539.9370	6	time is approximately 9:09 a.m.
8	wlambert@koehlerneal.com	7	This deposition is being held at
9	Representing the Plaintiff	8	the office of Drinker Biddle, One Logan
10	(Present via videoconference in	9	Square, Philadelphia, Pennsylvania.
11	Cleveland, Ohio)	10	The caption of the case is
12	DRINKER BIDDLE & REATH LLP	11	Hodell-Natco Industries, Inc. versus SAP
13	BY: GREGORY J. STAR, ESQUIRE	12	America, Incorporated, et al., filed in
14	One Logan Square	13	the U.S. District Court for the Northern
15	18th and Cherry Streets, Suite 2000	14	District of Ohio, Eastern Division, Case
16	Philadelphia, Pennsylvania 19103-6996	15	Number 1:08 CV 2755.
17	215.988.2700	16	The name of the witness is
18	Gregory.Star@dbr.com	17	Brooks Hilliard.
19	Representing the Defendants,	18	If counsel at this time will
20	SAP America, Inc. and SAP AG	19	please introduce themselves for the
21	REMINGER CO., LPA	20	record.
22	BY: ROY A. HULME, ESQUIRE	21	MR. STAR: Greg Star, on behalf
23	101 West Prospect Avenue, Suite 1400	22	of SAP America and SAP AG.
24	Cleveland, Ohio 44115-1093	23	MR. LAMBERT: Wes Lambert on
25	216.687.1311	24	behalf of Hodell-Natco Industries, Inc.
	rhulme@reminger.com	25	MS. MYERS: Laura Myers on
	Representing the Defendants,		
	LSI-Lowery Systems, Inc. and		
	The IBiS Group, Inc.		
	(Present via videoconference in		
	Cleveland, Ohio)		

	ALSO PRESENT:		
	W. RUSSELL STRAIN, CLVS		
	The Video Technician		
		Page 3	Page 5
1	I N D E X		
2	---		
3	WITNESS: BROOKS LOUIS HILLIARD		
4	QUESTIONED BY: PAGE:		
5	MR. LAMBERT 5		
6	MR. HULME 165		
7	---		
8	E X H I B I T S		
9	NUMBER DESCRIPTION MARKED FOR ID		
10	Exhibit 462 Expert Report 42		
11	dated August 10, 2012		
12	---		
13			
14	DEPOSITION SUPPORT INDEX		
15			
16	DIRECTION TO WITNESS NOT TO ANSWER		
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2 (Pages 2 to 5)

1 and I represent Hodell-Natco in this lawsuit
 2 against SAP and its business partner LSi and
 3 IBiS.

4 During the course of the
 5 deposition -- as you may be aware, Hodell is
 6 suing both SAP America, Inc. and SAP AG. I'm
 7 going to refer to them just jointly as "SAP."
 8 If for some reason you need to make a
 9 distinction between the two, please let me
 10 know. Okay?

11 A. Certainly.

12 Q. And I'll refer to LSi and IBiS
 13 just as "LSi." And the same rules apply. If
 14 you need me to make a distinction between the
 15 two, just let me know. All right?

16 A. I will.

17 Q. Since we're doing it by
 18 videoconference, there is a little bit of a lag
 19 between my question and your answer. So let's
 20 try to be careful about talking over each
 21 other. Try to make sure that my question is
 22 finished before you begin to answer, and I'll
 23 make sure that your answer is finished before I
 24 raise the next question.

25 Is that okay?

1 There have been others that have
 2 related to intellectual property issues related
 3 to hardware and/or software or other computer
 4 technology.

5 There have been a variety of --
 6 there have been a few times I've been deposed
 7 with regard to electronic discovery of data.

8 There have been a few times,
 9 other -- other issues related to computer
 10 technology, either hardware or software or
 11 services.

12 Q. Okay. When was the last
 13 instance you were deposed?

14 A. It was earlier this year, in a
 15 case that was a dispute between an automobile
 16 dealership and a hardware and software vendor
 17 that had sold a system to that dealership.

18 Q. And who were you -- who were you
 19 testifying on behalf of in that -- in that
 20 matter?

21 A. My client was the law firm that
 22 represented the dealership.

23 Q. So in that case, the customer of
 24 the software vendor?

25 A. Yes.

1 A. I'll do my best.

2 Q. Okay. And if you don't
 3 understand any of my questions, just please let
 4 me know, and I'll certainly do my best to
 5 rephrase it.

6 A. All right.

7 Q. Have you ever had your
 8 deposition taken before in a non-expert witness
 9 capacity?

10 A. Not that I recall.

11 Q. How many times have you had your
 12 deposition taken as an expert?

13 A. I don't recall the exact number,
 14 but it's in excess of -- of 30.

15 Q. Excess of 30 times?

16 A. Yes.

17 Q. Have they all been -- have they
 18 all related to software implementations?

19 A. No.

20 Q. Is there a way you can break
 21 those 30 down into any general categories?

22 A. At least half of them have
 23 related to software functionality and/or
 24 software implementations, and in some cases
 25 both.

1 Q. And they -- what was the general
 2 nature of the dispute?

3 A. It related to the software
 4 vendor's -- well, they were actually a complete
 5 system, hardware and software, that they had
 6 supplied to the -- to the dealership.

7 It related to the issues in the
 8 contract between the two. In particular, the
 9 dealership -- or the dealership believed that
 10 it was entitled to terminate the contract and
 11 the supplier believed -- maintained that
 12 it -- it was not.

13 Q. The vendor in that instance,
 14 would that be a party that would be similar to
 15 SAP or similar to LSi in this case?

16 A. In -- in some respects.
 17 Although in that case, the vendor sold a -- the
 18 hardware as well as the software, as well as
 19 providing all the services. There were no
 20 business partners involved with that vendor.

21 Q. So the vendor was actually the
 22 party that developed the software at issue?

23 A. Yes.

24 Q. Okay. What was the outcome of
 25 that case?

1 A. It settled shortly after my
2 deposition.

3 Q. Is that the -- is that the
4 Republic Ford class action matter that's
5 referenced in your report?

6 A. The -- the one that begins with
7 Republic Ford. There have actually been about
8 15 or 18 cases, one of which was a class
9 action. The others were all individual
10 litigation between the -- the supplier and
11 individual dealerships. And this was the most
12 recent of those.

13 Q. How many times have you actually
14 testified in trial or arbitration as an expert?

15 A. In excess of two dozen times.

16 Q. Have you ever been excluded from
17 testifying as an expert witness?

18 A. In one case, the law firm that
19 retained me, subsequent to retaining me and
20 subsequent to my preparing a report, wound up
21 stipulating to all of the issues that I was
22 retained to -- to analyze and speak about.

23 Prior to that stipulation, there
24 had been a -- a motion to exclude me. The
25 court did exclude me not because of any of my

1 qualifications, but, rather, because none of
2 the issues that I was going to testify about
3 were relevant anymore, since they had all been
4 agreed and/or stipulated by the parties.

5 That's the only time.

6 Q. Okay. You've never lost a
7 Daubert challenge or a Daubert hearing?

8 A. Well, that was a Daubert -- that
9 was a Daubert decision, but -- but it wasn't
10 based -- I wasn't excluded based on the normal
11 Daubert criteria. I was excluded because, as I
12 say, none of the issues that I was testifying
13 on were going to be raised during the course of
14 the trial.

15 Other than that, there has been
16 no time where I've been excluded on a Daubert
17 motion.

18 Q. Can you tell me who you have
19 spoken with at SAP relating to the issues
20 involved in this lawsuit or your report?

21 A. I spoke to several people, but
22 it was prior to completing the report. I've
23 been busy on other cases and doing other --
24 other work in the meantime. And I don't recall
25 the specific names of the people to whom I

1 spoke, but they are listed in my report. And
2 there's been none since then.

3 Q. Do you recall where in your
4 report it's listed, the people you spoke with
5 are listed?

6 A. There's a section in my report
7 that deals with the procedures near the
8 beginning of the report.

9 Q. Okay. I'll represent to you
10 that I don't see any names listed. If Mr. Star
11 wants to show it to you, he certainly can.

12 A. My -- I stand corrected. I
13 didn't -- I don't recall who I spoke to. And I
14 didn't -- I didn't list it here.

15 Q. Okay. Is it accurate to state
16 that you don't recall the names of any
17 individuals employed by SAP that you spoke with
18 in the context of this litigation?

19 A. Yes.

20 Q. Did you speak with any former
21 SAP employees in the context of this litigation
22 or your report?

23 A. Not that I recall.

24 Q. Did you speak with anyone
25 currently or formerly employed by LSi in the

1 process of analyzing and preparing your report?

2 A. No.

3 Q. Did you speak with any other
4 third parties in the context of preparing the
5 report in this case?

6 A. I spoke to a former salesman for
7 Profit 21, whom I've known for many years, and
8 I spoke to a former sales director for a
9 representative of the FACTS software, whom --
10 whom I've also known for -- for many years,
11 about those two products and how they're used.

12 But I didn't speak to them --

13 Q. And what was the --

14 A. I didn't speak to them about any
15 of the issues in this case.

16 Q. What was the P 21 salesman's
17 name?

18 A. Alan Wood.

19 Q. And what was the FACTS
20 salesperson's name?

21 A. Boy, it will come to me in a
22 second. You know, his name is on my website,
23 because I have -- we have contemplated doing
24 some work together. But I can check that at a
25 break and give it to you then. It escapes me

1 right at the moment.

2 Q. Okay. Other than the
3 educational background listed in your report,
4 do you have any other formal education or
5 training?

6 A. Well, I attend seminars related
7 to management consulting and expert analysis
8 and expert testimony put on by the Institute of
9 Management Consultants and the Forensic Expert
10 Witness Association from time to time. And I
11 have -- I have attended a number of those.

12 I attend seminars and/or
13 training sessions either through like webinars,
14 over the web, or sometimes in person, put on by
15 various suppliers of computer systems and
16 software. Nothing as formal as the
17 undergraduate engineering degree or the -- the
18 MBA program, obviously.

19 Q. Your undergrad degree was in
20 engineering from MIT, correct?

21 A. That's correct.

22 Q. Did you -- does that degree
23 relate at all to your opinions rendered in this
24 case?

25 A. Well, the engineering

1 Harvard MBA?

2 A. Yes. My concentration was in
3 marketing.

4 Q. Any specific aspect of marketing
5 or just marketing in general?

6 A. I really focused on
7 business-to-business marketing rather than
8 consumer marketing, and such that when I
9 graduated, I started working in marketing for
10 computer companies, doing business-to-business
11 marketing.

12 Q. Do you have any computer science
13 degrees?

14 A. No. At the time I went to MIT,
15 there was no computer science degree offered by
16 MIT, at least at the undergraduate level. I
17 believe at the graduate level as well. I
18 predated their offering a computer science
19 degree.

20 Q. Okay. With respect to your --
21 either MIT or Harvard, what's the extent of the
22 coursework you took with respect to computer
23 sciences?

24 A. I took the introductory course
25 on computers my first semester of my freshman

1 background, of course, is -- is the foundation
2 of -- on which my expertise has been built.
3 And I -- I certainly learned a fair amount
4 during the course of -- of my years at MIT
5 about computer systems, computer software,
6 computer technology. But there are no
7 specifics that come to mind, certainly, that
8 relate to the issues in this case.

9 Q. What year did you graduate from
10 MIT, by the way?

11 A. 1968.

12 Q. What year did you graduate or
13 obtain the MBA from Harvard?

14 A. I was actually in the Harvard
15 class of 1970. But as you may recall, we had a
16 war going on at the time, so I departed for
17 three years to serve in the military. And I
18 came back and graduated in 1973. I'm listed
19 for alumni purposes as part of the class of
20 '70.

21 Q. Okay. Are those the only two
22 formal degrees that you hold?

23 A. Yes.

24 Q. What did the -- did you have any
25 specialty or concentration with respect to the

1 year at MIT. I was able to persuade my
2 counselor to allow me to take the upper level
3 software programming course my second semester
4 as a freshman.

5 At that time, MIT offered only
6 two software courses to undergraduates. I took
7 both of them my freshman year. And then I
8 started working as a software developer for a
9 large software consulting firm summers and
10 part-time following my freshman year at MIT.

11 But there were no more
12 programming courses available for me to take,
13 so I didn't take any others. Many of my
14 courses used computers for various things. And
15 I was involved in that, but -- and there were,
16 of course, courses on hardware design and --
17 and the electronics of computers. But that
18 wasn't an interest of mine. And I didn't -- I
19 didn't take any of those courses.

20 So, basically, I exhausted MIT's
21 undergraduate software courses my freshman
22 year. This was early --

23 Q. And anything at --

24 A. -- in the industry.

25 Q. Anything at Harvard with respect

1 to computer sciences?

2 A. We used computer modeling in
3 some of the courses to model the way businesses
4 responded to various stimuli. And that was
5 pretty much the extent of it.

6 There may have been, also --
7 Harvard Business School is a case method
8 school, much like law schools operate on the
9 case method. And we may have had some courses
10 on computer -- marketing in the computer
11 industry or other computer industry-related
12 cases. But I don't remember specific cases.

13 Q. Do you have any experience
14 writing or reviewing software code?

15 A. Yes.

16 Q. And what -- can you elaborate on
17 your experience for me?

18 A. I'd be happy to.

19 Following my freshman year at --
20 at MIT, I -- beginning that summer and
21 continuing through my time at MIT, I worked as
22 a software developer for Informatics,
23 Incorporated, which at the time was one of the
24 largest software consulting firms in the world,
25 later absorbed into Sterling Software.

1 I worked on an Air Force project
2 my first summer with them. I later worked on
3 the Surveyor moon mission and the Mariner Mars
4 mission, developing software for those
5 missions.

6 And I also worked developing
7 commercial software that Informatics was
8 contracted with Honeywell Corporation to
9 develop. We developed software that Honeywell
10 was going to deliver -- I was involved in
11 developing software that Honeywell was going to
12 deliver to its customers throughout the world.

13 Upon graduating, I -- well, once
14 I went into the military, I joined the U.S.
15 Coast Guard and I was stationed at U.S. Coast
16 Guard headquarters in Washington, D.C., working
17 in the Naval Engineering branch of the
18 engineering division. I developed software for
19 vessel maintenance that was used by the Coast
20 Guard for at least ten years, was when I last
21 checked, after I developed it.

22 Upon going back to Harvard
23 Business School and graduating in '73, I
24 started working for computer companies,
25 including Linolex Systems, which was later

1 acquired by 3M, Sanders Associates, which was
2 acquired by Harris Corporation, and ITT
3 Courier.

4 I was involved as a marketing
5 manager and product line manager in all of
6 those companies, where I had direct
7 responsibility for specifying software
8 capabilities, working with our development
9 groups to develop software that met those
10 capabilities, ensuring that it did, monitoring
11 the progress of those software projects,
12 reviewing the test results, and then ultimately
13 marketing -- rolling out those products to the
14 market and -- and giving feedback and working
15 with development to improve the functionality
16 of those products to meet market demands as
17 they arose.

18 I wasn't actually doing the
19 development during -- in any of those
20 positions, but I had a direct interface with
21 the development managers and direct input and
22 review responsibility for the functionality and
23 quality of those products before I was willing
24 to roll them out to the customers in the field.

25 I should also say --

1 Q. On any of those projects you
2 just --

3 A. I should also say --

4 Q. I'm sorry.

5 A. -- after leaving Courier in
6 1980, I set up my own firm, which is the same
7 firm I have today, Business Automation
8 Associates, Inc., where from 1980 to 2000, the
9 majority of my work was working with businesses
10 that some of which could be considered very
11 comparable to Hodell-Natco, that needed to
12 understand -- to define their needs, find
13 software and hardware that would meet those
14 needs from various vendors, select the hardware
15 and/or software that -- that best met those
16 needs and got that software and followed
17 through to a successful implementation.

18 Part of that was looking for
19 software that was as close to plain vanilla as
20 possible, but in many cases there were add-ons
21 or modifications that had to be made to the
22 software that I would be responsible for
23 specifying and then working with the vendors or
24 monitoring the results of the vendors to comply
25 with the -- the specified add-ons or changes to

1 that software.

2 All of that software was
3 business software, products much like Business
4 One, in many cases products focused on a
5 particular market, such as distribution. And
6 it's in that capacity that I got to know the
7 folks from Prophet 21 and from FACTS.

8 Q. On any of those projects that
9 you just described where you actually developed
10 software, were you the lead developer or were
11 you a junior member of the team or what was
12 your actual position in the hierarchy there?

13 A. In -- starting from the
14 beginning, the -- the work with Informatics, I
15 was typically -- I was a member of a team, but
16 I was typically given a discrete capability
17 where I was the lead developer for that
18 discrete capability that had to be developed as
19 part of the -- of the contract or part of the
20 space mission.

21 In -- when I went to the Coast
22 Guard, I was the specifier and lead developer
23 of the vessel maintenance software that I did
24 at the Coast Guard.

25 I haven't done any software

1 communicate their needs accurately to the
2 suppliers of hardware and software. How to
3 find hardware and software vendors with systems
4 that could meet their needs. How to select the
5 option that best met their needs. What issues
6 they needed to look at in contracting with the
7 suppliers of those systems. And then what
8 things they needed to look at during the course
9 of implementation, to make sure that the
10 implementation was successful.

11 By and large, those were the
12 same issues that I did professionally as a
13 consultant.

14 Q. Is there anything in that
15 publication, the "Buying the Computer for Your
16 Growing Business" publication, that has any
17 bearing on your opinions in this matter?

18 A. No specifics. Although the --
19 the general approach that I advocate using, the
20 factfinding approach, is much the same as the
21 approach that I use in expert witness
22 engagements and that I used in this engagement.

23 Now, obviously the approach has
24 to be adapted to looking back forensically at
25 something that's already occurred rather than

1 development professionally since leaving the
2 Coast Guard. From that point on, I was
3 involved in management and the oversight of
4 development.

5 Q. Okay. So when was the actual
6 last development you did of software?

7 A. The last time I --

8 Q. The years.

9 A. -- personally wrote commercial
10 software professionally was 1972.

11 Q. You list two publications in
12 your report. One is, "Buying a Computer for
13 Your Growing Business," written in 1984.

14 What was the subject of that
15 publication?

16 A. That was a book published by Dow
17 Jones. The target audience for the book was
18 owners and managers of midsize businesses that
19 were looking to acquire business software for
20 their companies, helping them understand what
21 they needed to do to communicate their needs
22 accurately to the suppliers of the hardware and
23 software. And it was folks both on hardware
24 and software.

25 So what they needed to do to

1 looking forward to making a selection.

2 And some of the issues that I
3 bring up, issues that owners of companies or
4 decision-makers in companies need to look at,
5 are the same kinds of decisions that would be
6 faced by -- that were faced and would be faced
7 by Hodell-Natco and other businesses.

8 But in terms of specifics, I
9 don't know that I can name a specific that --
10 that would apply. There may be some. But I
11 don't know, off the top of my head. It's -- I
12 wrote the book in 1983. It was published in
13 1984. I haven't really gone back and read it
14 in some time.

15 Q. The second publication is,
16 "Seven Critical Areas: Increasing the
17 Effectiveness of Expert Testimony," For The
18 Defense.

19 What was the subject matter of
20 that publication?

21 A. You haven't accurately described
22 what that is. "For the Defense" is a trade
23 publication published, I think, by someone -- I
24 think it's the Defense Research Institute. I'm
25 not sure of the name of the organization. But

1 it's a magazine and web publication that goes
 2 to defense attorneys. I believe the market is
 3 primarily in the United States.

4 I was asked to put together an
 5 article on how lawyers who employ experts
 6 should work with those experts in helping them
 7 prepare for testimony.

8 Q. Is there anything in that -- in
 9 that article that relates to your testimony or
 10 bears on your testimony in this case?

11 A. No.

12 Q. Any other publications not
 13 listed in your report?

14 A. None within the time period.

15 Q. Have you ever overseen any
 16 implementations of SAP Business One?

17 A. I don't believe I have, no.

18 Q. Does your -- your company
 19 doesn't actually do software implementa-
 20 Business Automation doesn't actually do
 21 software implementations, does it?

22 A. No, we don't. That would be a
 23 conflict of interest in that some companies
 24 provide their own implementation services.
 25 Some have business partners who provide those

1 A. I have -- I'm the only full-time
 2 employee. I do employ other consultants on
 3 a -- on a contract basis, on a
 4 project-by-project basis, as needed.

5 Q. Are you the only employee that
 6 provides expert testimony or expert witness
 7 services?

8 A. No.

9 Q. You also --

10 A. I'm the only actual -- excuse
 11 me. I'm the only actual employee. From time
 12 to time, the subcontractors that I've used,
 13 some of them have given testimony and some of
 14 them have not, depending on the particular
 15 issues and their particular expertise and
 16 what -- what part of the project I engage them
 17 to -- to do.

18 Q. Okay. I took a look at your
 19 company's website and it listed four areas of
 20 consulting services you provide. One was
 21 computer information systems. The second was
 22 Internet strategy consulting. The third was
 23 expert litigation services. And the fourth was
 24 speaking engagements.

25 Is that accurate, to the best of

1 implementation services.

2 If I were to provide that
 3 service, as well as a consultant to buyers, I'd
 4 have a financial incentive to recommend my own
 5 implementation services or to recommend a
 6 system which would use my implementation
 7 services rather than someone else's.

8 And that could be perceived as a
 9 conflict of interest by the various vendors or
 10 suppliers and perceived as a conflict of
 11 interest by my clients.

12 And my stock-and-trade as a
 13 consultant is being able to provide objective
 14 advice to clients without conflicts of
 15 interest. So I don't do that.

16 Q. I'm going to ask you a few
 17 questions about Business Automation, Inc.

18 When was -- when was that
 19 company formed?

20 A. I started it in 1980 as a sole
 21 proprietorship and then incorporated in 1981.

22 Q. What's your current position
 23 with the company, if any?

24 A. I'm the president and owner.

25 Q. How many employees do you have?

1 your recollection, as to what your company
 2 does?

3 A. That's accurate as a -- as to
 4 what my company has done over the years.

5 I don't do Internet strategy
 6 consulting anymore. And I have not been active
 7 recently in the professional speaking.

8 And most of my work these days
 9 is the expert witness services.

10 Q. Do you offer any services that
 11 fall outside of those four general categories I
 12 just rattled off?

13 A. No.

14 Q. Can you -- over the past year,
 15 can you attribute a percentage of your time
 16 spent across those four subjects?

17 A. As I've reached my late fifties
 18 and sixties, I have focused more and more on
 19 the expert witness services because that's
 20 where the demand seems to be. Over the past
 21 year, that's been the vast majority of what
 22 I've done.

23 Q. Can you put a percentage on it?

24 A. Probably in excess of

25 90 percent.

1 Q. Okay. How about over the past
 2 five years, what percentage of your time has
 3 been spent providing expert witness testimony?

4 A. In excess of 80 percent.

5 Q. How about as a percentage of
 6 your business income over the past year, how
 7 much would you attribute of that to your
 8 services as an expert witness versus other
 9 aspects of your business?

10 A. The same as the percentage of
 11 the -- of the time.

12 Q. So in excess of 90 over the past
 13 year and in excess of 80 over the past five
 14 years?

15 A. Yes.

16 Q. Over the past five years, how
 17 much of your time has been spent on the
 18 selection or implementation of ERP software?

19 A. Not very much. I'm 66 years
 20 old. And as I say, starting around 2000, when
 21 I was in my mid-fifties, I -- and then with the
 22 advent of the -- of the Internet, the demand
 23 for my expert services and the fact that I had
 24 the experience doing that sort of work and a
 25 lot of other folks didn't, really has driven me

1 more and more toward -- toward that area of
 2 the -- of the consulting services.

3 So the vast majority of my -- up
 4 to 2000, the majority of my -- of my time was
 5 the consulting to businesses. Starting in
 6 2000, I think more than half was -- has been
 7 expert services. And from about 2005 on, it's
 8 been the -- the vast majority.

9 Q. Have you ever had any speaking
 10 engagements on the -- relating to the selection
 11 or implementation of ERP software?

12 A. Yes. I used to do that
 13 regularly in the late 1980s and 1990s.

14 Q. Nothing since the 1990s?

15 A. Pardon me?

16 Q. No speaking engagements relating
 17 to ERP software since the 1990s?

18 A. Not that I recall. There may
 19 have been one or two, but I don't -- I don't
 20 recall specifically.

21 Q. Have you ever been involved in
 22 consulting or selecting the ERP system for a
 23 microvertical industry?

24 A. Yes. That's almost entirely
 25 what I did from 1980 to 2000.

1 Q. Are you currently employed by or
 2 receiving --

3 A. And some -- and it tailed off
 4 after 2000. But I continued doing it after
 5 2000.

6 Q. Are you currently employed by or
 7 receiving income from any other businesses
 8 outside of Business Automation?

9 A. I have a -- well, my brothers
 10 and I own some property that throws off income.

11 Q. Okay. Before I move on, do you
 12 recall the name of the case where -- we talked
 13 about earlier where there was a Daubert
 14 challenge to your testimony?

15 A. I think it was Jerome's
 16 Furniture versus Red Prairie or it could have
 17 been Red Prairie versus Jerome's Furniture.

18 I do have a letter from the
 19 attorney that engaged me in San Diego that I
 20 could provide to counsel on that -- relating to
 21 that engagement that explains it. And
 22 certainly I believe you can -- you can look it
 23 up. It may be on Pacer or something.

24 Q. Do you recall where that
 25 litigation was venued?

1 A. San Diego, California.

2 Q. Was it in federal court?

3 A. I don't recall. It probably
 4 was, because it was a Daubert challenge. I
 5 don't think California had Daubert at the time,
 6 but I'm not sure.

7 Q. Any of the seminars or webinars
 8 you attended, did any of those relate to SAP
 9 Business One?

10 A. It may have. I don't recall any
 11 specifics that related to Business One. There
 12 may have been.

13 Q. Have you ever served as an
 14 expert witness for SAP prior to this
 15 engagement?

16 A. No.

17 Q. Have you ever provided any
 18 consulting services or other services to SAP?

19 A. No. I don't provide consulting
 20 services to vendors. And I'm -- I'm not
 21 engaged by SAP. In this case, I'm engaged by
 22 Drinker Biddle.

23 I -- once again, to preserve my
 24 independence and objectivity, I don't accept
 25 engagements directly from vendors or suppliers

1 of computer systems or computer products or
2 services.

3 Q. Have you ever been engaged by
4 the Drinker Biddle firm prior to this matter?

5 A. No. This is the first time I've
6 been engaged by Drinker Biddle.

7 Q. Can you give me a general
8 background on your experience with SAP Business
9 One?

10 A. Certainly. As a consultant, I
11 had clients where we looked at Business One as
12 an option for them, including -- I'm trying to
13 remember the name -- a company that made
14 specialty vehicles. They actually took tank
15 trucks and outfitted them for -- modified them
16 to -- for dust suppression, to spray water.

17 They did this modification to
18 vehicles in -- they were based in Phoenix.
19 They sold the products throughout the -- the
20 modified vehicles throughout the United States
21 and some internationally.

22 I actually was -- we got to the
23 point of recommendation and I was about to
24 recommend Business One. But then the company
25 suffered some financial -- well, there were

1 I think that's the only other
2 expert engagement I've had involving Business
3 One.

4 Q. Okay. I want to ask a little
5 bit about that expert engagement.
6 When was that engagement?

7 A. I believe it was about five
8 years ago. I -- I don't know off the top of my
9 head, but on the order of five years ago.

10 Q. Do you recall the -- the claims
11 that were being made by the furniture company
12 in that case?

13 A. They involved functionality that
14 the implementer had -- had promised to deliver
15 and was unable to deliver. I believe
16 subsequently, they engaged another implementer
17 and were able to get that functionality
18 successfully developed.

19 Q. Was it a Business One
20 functionality or an add-on functionality?

21 A. Add-on functionality.

22 Q. Were there any claims in that
23 case that the Business One software itself did
24 not perform?

25 A. No. SAP was not a party to that

1 some financial and political issues that they
2 became very involved with, Arizona-specific
3 issues. And they put off that acquisition and
4 kept their existing system.

5 I also looked at Business One in
6 other cases, in other client situations. I
7 can't recall the specifics. I think the one
8 that I just mentioned is United Truck, if I
9 recall the name correctly.

10 I looked at it in other
11 situations, but didn't -- wasn't on the point
12 of selecting it.

13 And then as an expert, I was
14 engaged in a case in North Carolina which dealt
15 with a Business One implementation. The
16 lawsuit -- Business One or SAP was not a party
17 to the lawsuit. The company was Kemp
18 Furniture. And they were suing the McGladrey
19 accounting firm and another implementer for the
20 implementation of Business One.

21 I was engaged by counsel for the
22 furniture company in North Carolina. That -- I
23 did produce a preliminary report in that case.
24 And then the case was subsequently settled
25 before -- before I produced a final report.

1 case. There were no -- there was no indication
2 at all that the Business One software did not
3 perform.

4 Q. Can you give me an overview of
5 that -- of the furniture company's environment
6 in terms of number of users, transacted volume,
7 things that we're addressing in this case?

8 A. I believe they had two
9 locations. I don't recall the number of users.

10 Q. Was it a high transaction volume
11 business or -- or something different than
12 that?

13 A. I -- I -- I don't recall. I
14 just don't recall the -- the transaction
15 volume.

16 Q. What was the subject matter of
17 your report?

18 A. Well, it was a preliminary
19 report. There had been no -- no substantial
20 discovery at the time. The -- so there were no
21 depositions. There were no documents from
22 McGladrey. There were -- nothing from the
23 opposing party.

24 I went to the furniture company.
25 I spoke to their employees. I -- and I

1 produced, as I say, a preliminary report that
 2 contained areas of interest where I expected
 3 that had the suit proceeded, I might well have
 4 had opinions, but I didn't actually state any
 5 opinions.

6 The hope at the time, I believe,
 7 was that a settlement could be reached, and it
 8 was.

9 Q. Was litigation actually -- was a
 10 complaint actually filed by the furniture
 11 company or was it resolved pre-suit?

12 A. I don't recall.

13 Q. The trucking company -- the
 14 United Trucking Company, you said, was looking
 15 at Business One and ultimately did not replace
 16 its legacy system.

17 Do you recall anything about the
 18 customer's environment in that case?

19 A. A bit.

20 Q. How many -- how many users were
 21 they looking at, Business One users?

22 A. To the best of my recollection,
 23 40 or 50.

24 Q. Do you recall anything about
 25 their business environment, transaction volume?

1 They then needed to track the
 2 progress of -- of the building and finishing of
 3 that vehicle from start to finish, including
 4 adding on quite a number of additional
 5 components that were not standard on the -- on
 6 the vehicle.

7 In addition to that, because
 8 they had a large install base of customers who
 9 had bought vehicles from them throughout the
 10 country in the past and also from competitors,
 11 they had a distributorship where they
 12 distributed replacement and repair parts for
 13 vehicles that they had built or that their
 14 competitors had built. And they had several
 15 thousand SKUs of parts.

16 They -- it was complex, also, in
 17 that they relied on the same parts inventory
 18 both for their manufacturing and for their
 19 distribution business. And it could be very
 20 complex in that some of the items in the -- in
 21 their inventory were long lead time items, some
 22 were short lead time items.

23 When they'd get a -- an order
 24 from a client for one or more vehicles, it
 25 would take them, as I recall, on the order of a

1 A. Pardon me?

2 Q. Anything about their transaction
 3 volume or other environment that would have
 4 impacted the implementation?

5 A. Yes. They actually had a --
 6 quite a complex business in that it was both a
 7 manufacturing business and it was a
 8 make-to-order manufacturing business, as well
 9 as a distribution business.

10 They would take orders from --
 11 their customers were largely construction
 12 companies. They would have -- they would
 13 configure the modifications they were going to
 14 do to the vehicles to order, how many nozzles,
 15 how big a tank and so forth.

16 There were a number of --
 17 whether they were going to make the
 18 modifications to a used vehicle, whether they
 19 were going to supply the vehicle, what type of
 20 vehicle it was and so forth.

21 There were a lot of different
 22 types of customizations that -- it's United
 23 Truck, if I recall the name of the company
 24 correctly -- that they would make to the
 25 vehicles.

1 minimum of six weeks and a maximum of three or
 2 four months to build a vehicle.

3 When they took the order, they
 4 knew what parts they were going to require, but
 5 the -- the actual usage of those parts was
 6 phased over the manufacturing process. And so
 7 they had to reserve parts in the joint
 8 inventory, which then could become -- there
 9 could be a demand on as replacement parts by --
 10 for their distribution business.

11 So it was actually a very
 12 complex company for a company of its size
 13 because of this combination of manufacturing
 14 and distribution and the interaction with the
 15 inventory.

16 And they were --

17 Q. Let me stop you there. My
 18 question was a little more specific than that.
 19 And it relates to some of the aspects of your
 20 report where you addressed Hodell's transaction
 21 volume and database size and things like that.

22 Do you have any knowledge of
 23 United Truck's transaction volume and database
 24 size and how it would compare to that of
 25 Hodell?

1 A. I don't recall. I believe the
 2 database size would -- would be roughly
 3 comparable, although I believe United Truck is
 4 a small -- has a smaller annual revenue than
 5 Hodell, may have been somewhat fewer -- well,
 6 you know, I don't know. It was a very
 7 extensive inventory with a lot of different
 8 kinds of parts.

9 So the inventory -- the number
 10 of SKUs in inventory could well have been the
 11 same. But -- but I don't -- I don't recall,
 12 off the top of my head, what the -- what the
 13 comparison would be.

14 Q. Okay. How many expert
 15 engagements do you have ongoing currently other
 16 than this one?

17 A. Six or eight.

18 MR. LAMBERT: Greg, do you have
 19 a copy of the report we can mark now?

20 Let's mark that as 462.

21 ---

22 (Whereupon, the court reporter
 23 marked for identification Exhibit 462.)

24 ---

25 BY MR. LAMBERT:

1 hour; is that correct?

2 A. I believe so, yes.

3 Q. Is that -- is that a standard
 4 rate across your engagements or is that
 5 different from your standard rate?

6 A. I take engagements at different
 7 points in time. I will hold a rate for a
 8 client if an engagement lasts for a long period
 9 of time.

10 This is my current rate today
 11 for new engagements, but I do have existing
 12 engagements where -- which have lower rates.

13 Q. Are they lower because the
 14 engagements began when you had a lower standard
 15 rate or is there a reason that the rate's
 16 different?

17 A. Actually, I do some eDiscovery
 18 consulting. Most of that work is done by an
 19 associate of mine, a Mr. Schnur. His rate is
 20 considerably below mine. And just because of
 21 the nature of that work, my rate on those
 22 engagements is lower. It's a different type of
 23 work.

24 But by and large, you know, I --
 25 I stick by my -- by my standard rate. It can

1 Q. Mr. Hilliard, the -- the court
 2 reporter has handed you what's been marked as
 3 Exhibit 462.

4 Is that a true and accurate copy
 5 of your expert report you submitted in this
 6 case?

7 A. Well, I haven't compared it page
 8 by page, but it appears to be.

9 Q. Okay. If you notice any --
 10 we're going to go through it, so if you notice
 11 anything that would, in your opinion, make it
 12 not a true and accurate copy, please let me
 13 know. Okay?

14 A. Certainly.

15 Q. Does that report contain all of
 16 the opinions you intend to offer at the trial
 17 in this case?

18 A. At this time, as far as I know,
 19 it does. I haven't been asked to look into
 20 anything -- anything else.

21 Q. Okay. I want to go a little
 22 bit -- I'm going to go through the report, kind
 23 of. We'll just go through it in order.

24 You stated that your
 25 compensation for this engagement was 475 an

1 at times vary. I've done some pro bono work
 2 and so forth. There have been times where I've
 3 done work for -- where an insurance company had
 4 a maximum that they would pay and I agree to
 5 take the engagement at that rate. But it's --
 6 it's not been below 450.

7 Q. Have you ever actually
 8 personally utilized or used the Business One
 9 software?

10 A. No.

11 Q. Have you ever looked at the
 12 Business One code?

13 A. No.

14 Q. Would you turn to Page 4 and 5
 15 of your opinion -- or of your -- of your
 16 report.

17 A. I'm there.

18 Q. Are those the only opinion --
 19 are those the only opinions you have with
 20 respect to this litigation, opinions one
 21 through eight?

22 A. I believe in my cover letter, I
 23 reserve the right to extend or amend my -- my
 24 investigation. And it's certainly conceivable
 25 that additional issues could come up where I

1 would take that opportunity that I reserve.
 2 But at this time, there are no
 3 other areas that I've been asked to look into.
 4 And I have no plans to look into or extend my
 5 opinions beyond these eight opinions that I
 6 have here.

7 Q. Okay. I want to ask you a
 8 couple of questions about the "Procedures"
 9 section of your report.

10 In the second paragraph, you
 11 make a statement, "It is my normal practice,
 12 when rendering opinions in legal matters, to
 13 use a rigorous and standardized methodology,
 14 and that is what I have done here."

15 Do you see that statement?

16 A. Yes.

17 Q. What is the "standardized
 18 methodology" you're referring to there?

19 A. Well, actually, you asked me
 20 earlier about my book, "Buying a Computer for
 21 Your Growing Business: An Insider's Guide."
 22 And it is basically the same methodology that
 23 I've used as a consultant from 1980 to the
 24 present.

25 Now, as I indicated when we

1 was done and so forth during the course of the
 2 implementation.

3 I guess I also -- you know, I
 4 skipped over the contract portion. There were
 5 contract decision issues here in late 2004 and
 6 late 2005. And I did review, from looking at
 7 those contracts and also reviewing the
 8 deposition testimony of those involved in that
 9 contracting process, so I did -- I did review
 10 that -- those issues pretty thoroughly. Not in
 11 the same way that I would as a consultant
 12 advising a buyer on negotiation -- how they
 13 ought to negotiate a contract, but, rather, as
 14 a -- an analysis of the process that took place
 15 at the contract -- contracting points in time
 16 in late 2004 and late 2005.

17 Q. Well, when you make the
 18 statement that this is a standardized
 19 methodology, who is it standardized by?

20 A. Well, I mentioned that I wrote
 21 this book in 1984. I'm certainly not the only
 22 consultant who has written books on the process
 23 of acquiring computer systems.

24 There have been numerous
 25 articles in the computer and business trade

1 talked about that, not every issue that is
 2 dealt with -- that one deals with in selecting
 3 a computer system is relevant in every
 4 engagement, and not -- not necessarily all of
 5 them are relevant here. And, also, because
 6 this takes place after the fact rather than in
 7 anticipation of making a decision on software,
 8 certain of the processes have to be modified.

9 But basically it starts out with
 10 understanding, in this case forensically from
 11 the documents, what the needs of the user are,
 12 understanding the functionality that was
 13 offered and committed to Hodell-Natco by LSi,
 14 and analyzing the fit between them and going on
 15 through the implementation, basically skipping
 16 over the portions on selection and contract
 17 negotiation, although I believe I did look at
 18 portions of the contract. Well, there were
 19 multiple contracts, obviously, and I did look
 20 at them, but there was no negotiation portion
 21 associated with it. And then looking at the
 22 implementation process that I would look at as
 23 a consultant, and how that proceeded, what the
 24 results were along the way, what milestones
 25 were met and what were not met, what testing

1 press, most of which are essentially the same
 2 as the process that -- that I laid out in my
 3 book.

4 So while there is no standard --
 5 standardization authority, such as the ISO,
 6 that standardizes this process, this is a
 7 peer-reviewed process that -- that has been
 8 published not only by me, but by others in my
 9 field. And also as a consultant, I've had the
 10 opportunity to confer with others in my field
 11 at consulting organizations and -- and meetings
 12 on the process that -- that they use.

13 So it's a consensus process
 14 widely used by consultants that do the same
 15 kind of work that I've done.

16 Q. Well, if I wanted to find
 17 support for your assertion that this is
 18 standardized methodology that's been
 19 peer-reviewed and tested, where could I find
 20 that?

21 A. I didn't say it had been tested.
 22 But you could certainly search in many of the
 23 business and trade publications, such as
 24 Computer World, Business Week. There are a
 25 number of business and computer industry trade

1 publications that have had -- outlined -- and
 2 in addition to those, actually more than those,
 3 there have been publications in a lot of
 4 individual industry trade publications by other
 5 consultants essentially outlining the same
 6 process that I use and that I laid out in my
 7 book.

8 But you would have to look
 9 through the business and industry trade
 10 publications that -- that go out to owners and
 11 managers of businesses and -- and find the
 12 articles.

13 Q. You make the statement in the
 14 next sentence, "My methodology follows all
 15 industry-accepted guidelines."

16 What guidelines are you
 17 referring to there?

18 A. The guidelines that I've seen
 19 published not only by myself, but by other --
 20 other consultants who have written in the
 21 national and industry business and computer
 22 industry trade press.

23 Q. Are those the same consultants
 24 and publications you just testified about or is
 25 that a different source of information I'd have

1 sources of information that you reviewed in the
 2 course of writing your opinion; is that
 3 accurate?

4 A. For the most part. If I think
 5 of someplace where I differ from that, I'll --
 6 I'll note it.

7 Q. I'm just trying to get an
 8 understanding of what you're talking about when
 9 you say, "factors."

10 A. Well, I -- I've relied on
 11 testimony. I've relied on written
 12 documentation. I've relied on recorded
 13 communications, electronically recorded
 14 communications, such as e-mails and/or letters
 15 and proposals. I've relied on direct
 16 discussions, where appropriate, with
 17 individuals who were involved in this
 18 situation.

19 It's the same types of sources
 20 that -- that are customarily relied on by
 21 experts in cases of this nature.

22 Q. I'm going to turn to Page 8 of
 23 your report, where you talk about the business
 24 partner relationship.

25 A. Yes.

1 to go to?

2 A. The same.

3 Q. You make the statement on Page 6
 4 at the top there, "I rely only on factors that
 5 are generally relied upon and considered
 6 reliable by experts in my field."

7 What's the basis for that
 8 statement?

9 A. The basis for that statement.
 10 Well, I've spoken with -- I've spoken with
 11 other experts. And I've seen a number of
 12 expert reports of other experts. And the --
 13 the sources that I've relied on are the same
 14 sources that other experts rely on.

15 The -- you know, I don't know --
 16 I don't know how I can answer -- answer your
 17 question any more specifically than that.

18 I'm -- I am -- I've been
 19 involved in a number of legal disputes. And
 20 I'm aware of the types of documents and
 21 resources that experts -- legal experts in this
 22 field rely on. And those are the same kinds of
 23 documents and sources that I rely on.

24 Q. Okay. So when you say, "I rely
 25 on factors," you're really referring to the

1 Q. Do you have any legal training,
 2 any formal legal training?

3 A. No.

4 Q. Do you have any background in
 5 the law or the legal profession, other than
 6 testifying as an expert?

7 A. Well, my wife is a retired
 8 judge.

9 Q. Okay. But you yourself
 10 personally don't have any background in the law
 11 other than testifying as an expert, correct?

12 A. I confer with my wife on things
 13 from time to time.

14 Q. Did you confer with your wife in
 15 the process of drafting this report?

16 A. No.

17 Q. Have you performed any legal
 18 research as part of preparing this opinion?

19 A. No.

20 Q. Did you ask your wife to perform
 21 the legal research in the course of preparing
 22 this opinion?

23 A. No.

24 Q. Do you have an understanding of
 25 the law of agency?

1 A. I have some level of
 2 understanding as it relates to transactions of
 3 this type. But I wouldn't consider that to be
 4 a legal understanding of -- of agency.

5 If I were called upon as a
 6 consultant, I would refer my -- for a legal
 7 understanding, I would refer my client to their
 8 own counsel.

9 Q. Well, what's your understanding
 10 of an agency relationship?

11 MR. STAR: Objection to the
 12 form. He's just testified that he's not
 13 offering an opinion on that. He is not
 14 engaged as a legal expert. And I don't
 15 think it's an appropriate question.

16 If you want to stay within the
 17 scope of his expert report, then you can
 18 do that. This is outside of that. He
 19 has not offered an opinion on a legal
 20 issue.

21 THE WITNESS: Should I answer?

22 MR. LAMBERT: We can move on.

23 BY MR. LAMBERT:

24 Q. In reference to the business
 25 partner term, you make the statement, "This

1 tax purposes. I've reviewed those.
 2 Also, before I got into
 3 consulting, as a -- as a marketer for both
 4 Linolex and Sanders, part of my responsibility
 5 was recruiting -- I'm not sure that the term
 6 "business partner" was as widely used then as
 7 it is now -- but recruiting organizations that
 8 would develop particular industry markets for
 9 our products and sell our products into those
 10 industry markets. And that is the precise
 11 relationship that today is most widely referred
 12 to as a -- a business partner relationship.

13 I've also seen -- well, I've
 14 seen a number of contracts during the course of
 15 my work as an expert between developers and
 16 business partners. So -- and, basically, all
 17 of those experiences have -- have distinguished
 18 the business partner relationship as being
 19 different from a formal legal partnership
 20 relationship.

21 Q. What's your basis for making
 22 that statement, though, if you don't have any
 23 legal training or background?

24 MR. STAR: Objection to the form
 25 of the question. It's argumentative.

1 term is widely recognized in business as having
 2 an entirely different meaning than the term
 3 'partnership' used in an accounting or tax
 4 context."

5 Do you see that statement?

6 A. Yes.

7 Q. When you say, "widely
 8 recognized," who is it widely recognized by?

9 A. Well, as I understand it, in an
 10 accounting or tax relationship, there is a -- a
 11 formal governmental designation of what is and
 12 what is not a partnership.

13 There have been numerous
 14 publications, books and trade -- and business
 15 trade publications, talking about the business
 16 partner -- what's called the business partner
 17 relationship and how it differs from the legal
 18 relationship of -- of one company forming a
 19 legal partnership with another.

20 It's a much more informal
 21 relationship. Most vendors, such as SAP and
 22 its competitors, have a description on their
 23 website as to what their partner -- their
 24 business partner relationships are. And it's
 25 not the same as a formal partnership for -- for

1 You can answer it if you
 2 understand it.

3 A. I understand from a taxpayer's
 4 standpoint what a legal partnership is. I have
 5 a legal partnership with my brothers, as I
 6 mentioned to you. And I've been involved as an
 7 investor in other legal partnerships. So I'm
 8 aware of -- of what a legal partnership is, at
 9 least from a tax standpoint.

10 I've also, as I mentioned
 11 previously, seen documents and numerous
 12 publications talking about the -- the term
 13 "business partner" as it's used in the computer
 14 industry, where some of them written by legal
 15 experts, distinguishing the business partner
 16 relationship, as that term is used in this
 17 industry, from a legal or a -- a partnership
 18 for -- for tax purposes.

19 So I have seen that distinction
 20 both as an investor in partnerships and as an
 21 industry -- an investor in legal partnerships
 22 and as an industry expert in the computer
 23 industry where the term "business partner" is
 24 used and, in almost every case, routinely
 25 described as being different than a legal or

1 tax partnership.

2 BY MR. LAMBERT:

3 Q. So you're talking about in a tax
4 context, is primarily what you're focusing on,
5 is the distinction between business partner in
6 this particular case and the business partner
7 in general. Is that your --

8 A. To the --

9 Q. Is that your testimony?

10 A. To the best of my understanding,
11 there are federal -- and I'm not a lawyer, but
12 to the best of my understanding, there are
13 federal codes defining what a partnership is
14 and what partners are.

15 And -- and while I haven't
16 analyzed those from a legal point of view, I am
17 aware that that description that's in federal
18 code and may also be in state code, I'm aware
19 that that relationship is different from what a
20 business partner relationship is in this -- as
21 that term is used in this industry.

22 Q. The only -- only publication,
23 for lack of a better word, that you cite with
24 respect to what a business partner is, is this
25 Wikipedia entry, though; isn't that correct?

1 (Pause)

2 A. No. I think it's a good
3 summary. And it also makes a distinction I
4 note between --

5 Q. Why didn't you cite --

6 A. -- between business partner and
7 formal partnership.

8 Q. Why didn't you cite any of those
9 other legal or -- publications that you said
10 you reviewed in support of this opinion?

11 A. Well, I didn't specifically
12 review any others particularly for this
13 engagement. I cited this one because it was
14 a -- a very good explanation and a
15 comprehensive summary of what I've known as
16 an -- as an expert in this industry and as a
17 participant in this industry since the 1960s up
18 to the present. And it -- it probably
19 explained the concept of business partnership
20 as well or better than any other definition
21 that I had ever seen.

22 Q. Okay. Do you recall the names
23 of any of those other publications that you
24 were referencing earlier?

25 A. Well, I know, for instance, the

1 A. Yes. And I cited that for a --
2 for a specific -- I typically would not cite
3 Wikipedia. But I cited it in this case for a
4 particular purpose.

5 Q. What was the purpose?

6 A. Well, I think while Wikipedia is
7 not particularly reliable or can't be
8 necessarily relied on for specific facts, it is
9 a good source of coalescing industry consensus.
10 And I thought that the definition given in
11 Wikipedia was consistent with -- and I believe
12 it's footnoted in Wikipedia with sources, but
13 it's consistent with the definition that is
14 widely -- that I've heard widely used, that
15 I've seen on -- on vendor websites and that
16 I've seen described in industry publications.

17 So I found -- I used it

18 specifically because it was a good summary of
19 the wide variety of publications of what the
20 industry understanding of this is. This isn't
21 a fact. I'm talking basically about an
22 industry understanding.

23 Q. Is there anything in this
24 summation of the term "business partner" from
25 Wikipedia that you don't agree with?

1 Oracle website and the SAP website both have
2 definitions of business partners on them
3 specifically.

4 In terms of other publications,
5 I don't recall the names of them off the top of
6 my head, but those would be two good ones.

7 I believe Microsoft also --

8 Q. What's the SAP --

9 A. I believe the Microsoft website
10 also has a definition, but --

11 Q. What's the SAP website's
12 definition?

13 A. I don't recall, off the top of
14 my head, but it's consistent with the Wikipedia
15 summary.

16 Q. On Page 10 of your report, you
17 make the statement -- it's in -- there's a
18 heading, "The nature of Business One." And in
19 the second paragraph you state that, "Business
20 One product is comparable to its other ERP
21 products, including MySAP and R/3."

22 What do you mean by
23 "comparable"?

24 A. The types of functionality
25 offered by Business One are of the same nature,

1 perhaps not as extensive, but of comparable
 2 nature to the other SAP ERP products.

3 Q. And then there's three bullet
 4 points there. The last one states that -- and
 5 I'll summarize it -- Business One is designed
 6 for faster and easier implementation than other
 7 ERP packages.

8 What do you mean by that?

9 A. Because Business One is focused
 10 on the small-medium business market, the SMB
 11 market, which doesn't have the same complexity
 12 of needs of multi-national corporations, for
 13 example, and because the management of SMB
 14 companies doesn't have the level of
 15 sophistication that is often found in larger
 16 companies that use SAP's other ERP, and by that
 17 I mean enterprise resource planning, products,
 18 Business One is focused on a simpler
 19 implementation process that can be done by a
 20 less sophisticated customer and done at lower
 21 cost than would typically be the case with
 22 MySAP or R/3.

23 Q. On Page 11 --

24 THE WITNESS: By the way, we've
 25 been -- we've been going for about an

1 products.

2 A. I'm at Page 11.

3 Q. Okay. You make the statement
 4 about a major drawback of add-ons being that
 5 they interrupt the natural processing flow in
 6 the base software.

7 Do you see that statement?

8 A. I recall writing something to
 9 that effect, but I don't recall exactly where
 10 that is on the page.

11 Q. It's on the second full
 12 paragraph. It starts, "There is one major
 13 drawback to the use of add-ons."

14 A. Oh, yes. Okay, I'm there.

15 Q. What -- what about add-ons
 16 creates these performance slowdowns or other
 17 problems that you reference in that sentence?

18 MR. STAR: Objection to the
 19 form.

20 Go ahead.

21 A. Well, I didn't say they always
 22 do. I said they can. And it's because they
 23 are not something that are -- that was
 24 necessarily in -- I'm talking about the
 25 industry in general here, not about this

1 hour and a half. When you reach the end
 2 of a line of questioning, perhaps a break
 3 might be in order.

4 MR. LAMBERT: Yes.

5 THE WITNESS: It doesn't have to
 6 be right now.

7 MR. LAMBERT: I don't want to
 8 take a long one. We don't have a lot of
 9 time with you. This is taking a little
 10 longer than I thought it was going to.
 11 So we can take one now, though.

12 THE VIDEO TECHNICIAN: Going off
 13 the record at 10:38. This will end tape
 14 number one.

15 ---

16 (Whereupon, a recess was taken
 17 from 10:38 a.m. to 10:47 a.m.)

18 ---

19 THE VIDEO TECHNICIAN: The time
 20 now is 10:47. Back on the record.

21 Beginning of tape number two.

22 BY MR. LAMBERT:

23 Q. Mr. Hilliard, before we broke, I
 24 asked you to look at Page 11 of your report
 25 where there's a discussion about add-on

1 specific situation.

2 But add-ons are not -- in
 3 general, are not something that the original
 4 developer of the software did or could have
 5 envisioned, at least in -- in many cases. And
 6 there is the potential, because it is -- the
 7 add-on software is, in fact, added, that the
 8 amount of -- the way that the add-on interfaces
 9 with the base software, the way that the
 10 processing time required to execute the -- the
 11 code in the add-ons, the way the add-ons affect
 12 the data that's used by the base software,
 13 there are a number of -- of things that add-ons
 14 can do that would result in, from an end user
 15 standpoint, a difference in the -- in the
 16 performance in -- as I say, in terms of --
 17 BY MR. LAMBERT:

18 Q. Well, you make the statement in
 19 here --

20 MR. STAR: He's not done his
 21 answer.

22 BY MR. LAMBERT:

23 Q. You make the statement in
 24 here --

25 MR. STAR: Whoa, whoa, whoa.

1 MR. LAMBERT: I'm sorry.
 2 MR. STAR: He wasn't done.
 3 MR. LAMBERT: Okay.
 4 A. And I -- yeah, I was saying
 5 there are a number of things that it could do
 6 that -- that create a risk, not necessarily a
 7 certainty, of slowdowns or other problems
 8 related to processing time of the add-ons,
 9 changes to the database, interface issues and
 10 so forth.
 11 BY MR. LAMBERT:
 12 Q. You make the statement in this
 13 sentence, though, with respect to Business One
 14 specifically.
 15 Is there something specific
 16 about Business One that you were addressing?
 17 A. It would be the same for add-ons
 18 to any other business software. I reference
 19 Business One because that's what was at issue
 20 in this case.
 21 But -- but these same issues
 22 would come up with any ERP type or other
 23 business software that had add-ons.
 24 Q. Well, isn't one of the features
 25 that Business One has advertised as having as

1 BY MR. LAMBERT:
 2 Q. Well, should the potential
 3 problems created by add-ons be disclosed by the
 4 software company?
 5 MR. STAR: Objection to form.
 6 A. I think every -- it's common
 7 knowledge that add-ons have -- create a level
 8 of risk. That's why the -- the term "plain
 9 vanilla" has come into -- into common use.
 10 Everybody knows, who -- who has
 11 some experience with implementing computer --
 12 business computer software, that it's better to
 13 be as close to a plain vanilla implementation
 14 without add-ons as -- as possible.
 15 I -- if this were some factor
 16 that was unknown or totally unanticipated by
 17 customers of ERP software companies, perhaps
 18 there ought to be a specific warning.
 19 But -- but the warning of this
 20 nature is -- I mean, there's no need for a
 21 specific written warning of that because it's
 22 common business knowledge. And it's certainly
 23 common business knowledge --
 24 BY MR. LAMBERT:
 25 Q. What's your basis for --

1 being the ability to accommodate add-ons to add
 2 functionality?
 3 MR. STAR: Objection to form.
 4 You can answer if you
 5 understand.
 6 A. All -- all -- all business
 7 software -- almost all business software, to --
 8 from my experience, makes the claim that
 9 it's -- add-ons can add capabilities that the
 10 software doesn't inherently have.
 11 Not all add-ons cause problems.
 12 It just creates a -- an area of risk that --
 13 with Business One or any other similar
 14 software -- that there's an additional issue of
 15 risk that everyone is aware of that occurs
 16 whenever you do an add-on.
 17 The fact that the software is
 18 designed to accept add-ons and has application
 19 programming interfaces for add-ons doesn't
 20 ameliate -- ameliorate this risk. It --
 21 obviously, SAP and other vendors try to make it
 22 as smooth as possible to minimize it. But to
 23 my knowledge, neither SAP nor anybody claims
 24 that the addition of -- of add-ons can be done
 25 risk-free.

1 A. -- for companies that have
 2 implemented a sophisticated business software
 3 in the past.
 4 Q. What's your basis for the
 5 statement that that risk is common business
 6 knowledge? Can you point me to anything?
 7 A. Yeah. Do a Google search on
 8 plain vanilla.
 9 Q. So your -- the basis for that
 10 statement that it's common knowledge would be
 11 for me to perform a Google search; is that
 12 your --
 13 A. Well, that certainly --
 14 MR. STAR: He already answered.
 15 Objection to form.
 16 A. (Continuing) That would be --
 17 that would be one basis.
 18 The -- you can hardly read
 19 anything in the business press or in the
 20 computer trade press or anything that's been
 21 discussed at trade association meetings about
 22 the implementation of sophisticated business
 23 software to perform enterprise functions that
 24 doesn't say keep it as close to standard or,
 25 quote, plain vanilla, as possible. Avoid

1 making add-ons or modifications to the software
 2 because of the risk.

3 Doing the Google search --

4 BY MR. LAMBERT:

5 Q. You're talking about --

6 A. I mean, I was kind of flip by
 7 saying, "the Google search." But doing that
 8 Google search would, in fact, show you how --
 9 how common that knowledge is.

10 Q. In the computer industry, is
 11 that your testimony? It's common knowledge in
 12 the computer industry?

13 A. No. It's common knowledge --
 14 it's common knowledge among businesses and
 15 buyers of computers --

16 Q. Or to consumers as well?

17 MR. STAR: Let's him finish his
 18 questions, Wes -- or let him finish his
 19 answers, Wes.

20 MR. LAMBERT: I'm not trying to
 21 interrupt him.

22 MR. STAR: Well, you are.

23 MR. LAMBERT: It's just because
 24 of the lag in the --

25 MR. STAR: It's not that you're

1 out those steps? What is that based on?

2 A. I didn't necessarily mean this
 3 to be a comprehensive and all-inclusive list of
 4 every step that -- that could be used. But the
 5 particular steps that I have included here are
 6 steps that are distributed by -- steps and/or
 7 recommendations that are promulgated by every
 8 major software company to its customers.

9 There are books written about
 10 these steps, some specifically for SAP
 11 software, some specifically for Oracle
 12 software, some in general. Most of these steps
 13 have also been discussed in industry trade
 14 publications. And I'm not talking about the
 15 computer industry, I'm talking about there are
 16 distribution industry trade publications,
 17 manufacturing industry trade publications.

18 These are the steps that are
 19 included typically in the process description
 20 that software companies, including SAP,
 21 including Oracle, including Microsoft and
 22 others, give to their clients before going
 23 on -- embarking on an implementation of new
 24 software.

25 Q. On Page 15, you have an itemized

1 not trying to. You are, in fact,
 2 interrupting him. So whether you're
 3 trying to or not makes no difference.
 4 You're, in fact, interrupting him. Allow
 5 him to finish his answer.

6 A. My answer is -- is, your
 7 characterization is incorrect. It is not just
 8 common knowledge in the computer industry.
 9 It's common knowledge among buyers of business
 10 software of all sizes. It's common knowledge
 11 among users of business software, regardless of
 12 their -- of the volume of their business or the
 13 size or complexity of their business.

14 And certainly any company that's
 15 ever used business software of this type would
 16 have that knowledge. It's common knowledge
 17 everywhere.

18 BY MR. LAMBERT:

19 Q. Okay. Can you turn to Page 12.

20 A. I'm there.

21 Q. You've got a list of steps in
 22 the implementation process.

23 How did you -- how did you --

24 A. Go ahead. I'm there.

25 Q. How did you arrive at listing

1 list of vendor/implementer responsibilities.

2 A. Yes.

3 Q. In the vendor/implementer --
 4 what do you mean by "vendor/implementer"? Does
 5 that including SAP and LSi in this case?

6 A. Well, if you look at the prior
 7 page, I talk -- I talk about the implementation
 8 having responsibilities on the part of the --
 9 of the client and responsibilities on the part
 10 of the vendor and implementer.

11 As -- as I understand this
 12 particular situation, SAP's formal involvement
 13 as a vendor didn't occur until after the
 14 signing of the license agreement at the end of
 15 2005. So some of these responsibilities would
 16 be strictly LSi's. And some conceivably, to
 17 the extent that SAP may have been involved
 18 after the beginning of 2005, could apply to SAP
 19 as well. Although one has to look at -- at the
 20 solution that was ultimately implemented at
 21 Hodell-Natco as being an amalgam of a very
 22 complex, developed-from-scratch add-on to the
 23 Business One software and the Business One
 24 itself.

25 Under a circumstance where the

1 primary contact between the vendor and the
 2 customer up until well after the -- the
 3 implementation -- the SAP license agreement had
 4 been signed and even continuing after that, the
 5 vast majority of the contact was between LSi
 6 and Hodell-Natco. So the primary
 7 responsibility for almost all of this would
 8 fall with LSi.

9 It's not inconceivable that some
 10 of them -- and we have to look at item by
 11 item -- it's not inconceivable that SAP might
 12 have some responsibility for some of these.

13 But by and large, they were --
 14 SAP was not the entity with the direct contact
 15 or the direct responsibility for making --
 16 putting together the amalgam of the LSi and
 17 Radio Beacon and Business One solution. That
 18 was LSi's responsibility.

19 Q. My question was simply, by the
 20 term "vendor/implementer," do you mean SAP and
 21 LSi or just LSi?

22 Let's -- I just want an answer
 23 to that.

24 A. For the most part, LSi. We
 25 could go item by item. There might be --

1 coordination with customer to resolve issues
 2 after going live and the ongoing customer and
 3 software support, SAP could well have had some
 4 subsidiary responsibilities in -- in those
 5 areas.

6 But even in those areas, the
 7 primary responsibility, since we're talking
 8 about an amalgam of -- of the LSi what are
 9 called In-Flight extensions, or IFE, the Radio
 10 Beacon and the Business One, since the -- this
 11 amalgam was -- was LSi's responsibility, not
 12 SAP's.

13 BY MR. LAMBERT:

14 Q. Can we turn to your first
 15 opinion on Page 17.

16 A. Okay.

17 Q. Opinion number one is, "The
 18 process of partnering between software
 19 companies and software implementation firms is
 20 done to facilitate client service and support,
 21 not to isolate the customer from the software
 22 company."

23 What is the basis for that
 24 opinion?

25 A. Well, I -- I've explained the

1 Q. I don't want to go item by item.
 2 A. There might be one or two items
 3 in here where there -- where there would be
 4 some SAP responsibility. But we'd have to look
 5 at each item.

6 Q. Well, can you point to any of
 7 those items and say which one would be SAP's
 8 responsibility --

9 MR. STAR: Objection.

10 BY MR. LAMBERT:

11 Q. -- in your opinion?

12 MR. STAR: Objection to form.

13 Are you asking him SAP's responsibility
 14 perhaps in general or specifically in the
 15 context of this case?

16 MR. LAMBERT: In this case.

17 MR. STAR: Do you understand the
 18 question?

19 THE WITNESS: I believe I do.

20 MR. STAR: Okay.

21 A. The one saying -- there are none
 22 where SAP would have the primary
 23 vendor/implementer responsibility.

24 But the support of customer
 25 during comprehensive testing, the good faith

1 basis in the following page. I referred back
 2 to the industry background that I gave and why
 3 it is that SAP and other software vendors
 4 utilize business partners, such as LSi, to --
 5 for sales and implementation, because
 6 they're -- as I've explained, they're closer to
 7 the customer. They're able to provide support
 8 more cost effectively and generally at a lower
 9 cost, because they can focus on individual
 10 customers better than a large company that has
 11 to deal with multi-nationals as well as small
 12 customers, because they're capable of providing
 13 add-on software and doing the configuration of
 14 the software as needed.

15 It makes sense not to isolate
 16 the customer from the software developer, but,
 17 rather, to provide a -- a nearby and focused
 18 support organization that can deliver a level
 19 of support more cost effectively and more
 20 locally to the -- to the customer than the
 21 software developer itself could.

22 Q. You make the statement, "no
 23 organization that has ever used an ERP . . .
 24 software product . . . would have been able to
 25 do so without signing a license agreement."

1 Do you see that?
 2 A. I recall having written that. I
 3 don't see where I -- where it is on -- is it on
 4 Page 17?
 5 Q. Yes, at the bottom of the first
 6 paragraph.
 7 A. Oh, yes. Oh, I see that.
 8 Q. How does that -- how do we
 9 verify that statement?
 10 A. Experience.
 11 Q. No organization you've been
 12 experienced with, right?
 13 A. I've got to tell you, I've --
 14 I've been involved in the acquisition of
 15 literally thousands of software products over
 16 the past 40 years. I have never seen a
 17 commercial software package where there was not
 18 a license to be signed.
 19 Every single commercial
 20 software -- there are open source products.
 21 But even those, many of them have an open
 22 source agreement. But every commercial
 23 software package I have ever seen -- and
 24 I've -- as I say, I've seen thousands of
 25 them -- all have a license to be signed. That

1 companies license commercial software. They
 2 don't buy it. And they sign a license
 3 agreement.
 4 Q. Have you made any assumptions in
 5 the process of rendering opinion number one?
 6 MR. STAR: Objection to form.
 7 A. Well, I --
 8 MR. STAR: Take your time and
 9 read through it, if you need to. He's
 10 asking you about the entire opinion,
 11 which covers, in your report, a little
 12 bit more than a page. So take your time.
 13 BY MR. LAMBERT:
 14 Q. I want to know if there's any
 15 assumptions that you've made in the process of
 16 rendering opinion number one.
 17 A. None come to mind, although I
 18 don't rule out that there might have been an
 19 assumption.
 20 Is there something in particular
 21 you're -- you're concerned about?
 22 Q. No. I just want to know if
 23 the -- I mean, I want to know if your entire
 24 opinion and what you're basing it upon is set
 25 forth on Pages 17 and 18 --

1 A. Well, I refer back --
 2 Q. -- your entire opinion number
 3 one.
 4 A. Well, no. I refer back to the
 5 "Industry Background" section which begins
 6 on --
 7 Q. Okay.
 8 A. -- Page 6.
 9 So I think the -- the support
 10 for that -- for that opinion goes from Page 6
 11 through Page 18.
 12 And as I say, I wouldn't rule
 13 out that there might be an assumption here or
 14 there, but none come to mind.
 15 Q. Well, if one comes to mind, let
 16 me know. I'm entitled to know what you're
 17 relying upon in forming this opinion. So if
 18 there's something that's not in this report
 19 that you're relying upon on the basis of
 20 forming opinion number one or any of the other
 21 opinions we're going to discuss, please let me
 22 know. Okay?
 23 A. I -- I'd be --
 24 MR. STAR: You know what? I
 25 object to that, Wes. He's answered your

1 question and that's totally
 2 argumentative.
 3 Go ahead and ask an actual
 4 question.
 5 THE WITNESS: Should I answer?
 6 MR. LAMBERT: I'm asking him
 7 just to let me know --
 8 MR. STAR: You didn't ask
 9 anything.
 10 MR. LAMBERT: -- if there's
 11 something --
 12 MR. STAR: You made argument to
 13 him. And he already answered the
 14 question.
 15 Go ahead and ask another one.
 16 MR. LAMBERT: I'm not arguing.
 17 I'm saying -- I'm telling him I would
 18 like to know what he's relying upon in
 19 rendering this opinion and the others.
 20 And if there's something, an assumption
 21 that comes to mind that he used that
 22 isn't stated in here, I'd like to know
 23 it. That's all I was saying. I wasn't
 24 arguing with anyone.
 25 MR. STAR: Go ahead and ask a

1 question.

2 BY MR. LAMBERT:

3 Q. Let's go ahead to opinion number
4 two. It's on Page 18 of your report.

5 A. I'm there.

6 Q. Are there any assumptions not
7 contained in your report that form the basis of
8 opinion number two?

9 A. Well, I can think of one off the
10 top of my head. And I had -- and this is just
11 from the first page. And that is that Hodell's
12 acquisition of the license for FACTS was
13 consistent with the way FACTS normally licenses
14 its software.

15 And as a consultant, I've had
16 clients that have licensed FACTS software. So
17 I -- I assumed that Hodell had to sign a
18 license for FACTS just like every other FACTS
19 user that I'm aware of has had to -- to sign a
20 license. That's an assumption.

21 Q. Okay. Any others?

22 A. I'm going -- I'm moving forward.

23 I -- I list an understanding of
24 the meaning of the memorandum opinion that I've
25 cited in -- in footnote 16. I'm assuming that

1 A. In -- in some cases, it's an
2 exemplary document. There may be others as
3 well. And it's not necessarily -- so it's not
4 necessarily the only or best document that --
5 that might support it. But I felt in every
6 case, it's -- it was an adequate support and it
7 was, if not the only support, exemplary of the
8 other -- of other documents.

9 Q. How would I determine what other
10 documents you're relying upon to make such a
11 statement if it's not referenced in here?

12 A. Ask me. Ask me a question.
13 Show me a document and -- and -- and let me
14 know whether -- ask me whether it's one that I
15 saw or considered.

16 Q. Well, I'll represent to you
17 there's been hundreds of thousands of pages of
18 documents produced in this case. That's just
19 not feasible. And we could be here all day if
20 you want to do it that way.

21 But I'm trying to determine what
22 you're relying upon in order to reach some of
23 the conclusions you've -- you've made in here.
24 And I'm trying to determine if the document
25 that you footnoted in your report is what you

1 my understanding, as I've characterized it in
2 that sentence, is correct.

3 Q. Okay. Any other assumptions?

4 A. I'm -- I'm proceeding.

5 Q. Okay.

6 (Pause)

7 A. Those are the only two that --
8 that I'm able to identify on reading it. In
9 most cases, I rely on facts or documents. And
10 I think I have amply footnoted what facts and
11 documents I've relied on.

12 Q. Okay. And let's try -- I'll try
13 to speed this up so we can get you on your
14 flight home.

15 A. Thank you.

16 Q. You cite -- for a lot of the
17 factual propositions in your report, you
18 footnote what you referred to or what documents
19 you referred to, correct?

20 A. Yes.

21 Q. Is it fair for me -- is it fair
22 for us to agree that if you footnoted a
23 particular document, that is the document
24 you're relying on for that particular
25 assertion?

1 relied upon or if there's something outside of
2 your report that you're relying upon.

3 A. In -- in every case, the
4 document I footnoted is adequate support.

5 Certainly if you were to ask me
6 a detailed question about any particular item
7 in my report and ask me for some additional
8 level of understanding, I might need to
9 research what other documents or testimony I --
10 I viewed that -- that had an effect on it.

11 But in every case, I -- it is
12 safe to assume that I believe that the
13 footnoted reference is adequate support for
14 the -- the particular statement or the
15 particular fact that I've -- that I've stated.

16 But, for instance, if I've
17 referred to a deposition, I may have referred
18 to one place in the deposition or two places in
19 the deposition, but I haven't necessarily
20 referred to every single reference in that
21 particular definition (sic) to -- even though I
22 read the entire deposition.

23 MR. STAR: You said
24 "definition." You meant deposition?

25 THE WITNESS: Deposition, yes.

1 A. (Continuing) I haven't
 2 necessarily read -- referenced every single
 3 reference in the deposition to that particular
 4 issue. But I tried to reference one or more
 5 places that were sufficient support.

6 BY MR. LAMBERT:

7 Q. Okay. I'm not as concerned with
 8 the deposition testimony as much as I am with
 9 the documents, the Bates labeled documents,
 10 you've cited.

11 A. The same thing would apply,
 12 however.

13 Q. Okay. Is the basis for your
 14 opinion number two -- and, again, I'm trying to
 15 speed this up a little bit -- understanding
 16 that there are some prefatory statements made
 17 in the prior parts of the opinion, is the basis
 18 for opinion number two as set forth on Pages 18
 19 through 22 of your report?

20 A. I don't understand. Could you
 21 rephrase that question? I'm not sure I
 22 understood what you were asking.

23 Q. Understanding that you've
 24 testified that some of the bases of your
 25 opinions are included in the prefatory parts of

1 testimony. But for what I've stated, the
 2 support is here.

3 Q. Okay. And that's all I'm trying
 4 to get an understanding of, without asking you
 5 what every single word on this report means.
 6 I'm trying to get an understanding of if
 7 there's something -- a conclusion or an opinion
 8 rendered in this report, if there's -- if
 9 you're relying upon or basing it upon something
 10 that isn't noted in the document. Okay?

11 A. Okay. I -- I -- I looked at
 12 plaintiff's expert's report. And I think I
 13 have given a more detailed explanation of the
 14 support for my statements, considerably more
 15 detailed, than plaintiff's expert.

16 Q. Okay. Let's move on to the
 17 third opinion on Page 22. "There is no
 18 supportable basis for Mr. Gumbel's assertion
 19 that SAP's Business One ERP software was
 20 incapable of scaling up to support a business
 21 the size of Hodell."

22 Can you tell me what assumptions
 23 you've made in course of rendering that
 24 opinion?

25 A. Let me look at it, please.

1 your report -- okay?

2 A. Okay.

3 Q. -- is the -- other than that, is
 4 the entire basis for your opinion number two
 5 completely set forth and contained in Pages 18
 6 through 23 -- 22 of your report or is there
 7 somewhere else I should look?

8 A. I -- the entire basis is the
 9 re -- is contained in -- primarily in the pages
 10 leading up to opinion two. I -- there might be
 11 something in a later opinion that also bears on
 12 this.

13 But by and large, you can assume
 14 that -- that for the statement I've made, that
 15 the basis for that statement is specified and
 16 explained on Pages 18 through 22 and the
 17 footnoted documents and testimony on those
 18 pages.

19 If you were to ask me for some
 20 clarification on something or some greater
 21 depth of detail on something I've -- I've
 22 stated there, it's certainly conceivable that
 23 in order to provide that clarification or a
 24 greater depth than what I've actually stated, I
 25 might need to refer to other documents or other

1 (Pause)

2 MR. STAR: Are we off the
 3 record?

4 MR. LAMBERT: No.

5 THE WITNESS: I'm looking for
 6 assumptions.

7 (Pause)

8 A. (Continuing) I -- I -- on
 9 initial look here, I don't -- I can't identify
 10 any particular assumptions that I've made.

11 I'm basically commenting here on
 12 the lack of support that Mr. Gumbel has -- has
 13 offered. He's made a lot of assertions and
 14 without much -- without support that I could
 15 identify at all from his report.

16 BY MR. LAMBERT:

17 Q. Okay. And the -- and the basis
 18 for your disagreement with Mr. Gumbel is set
 19 forth in the exhibits and documents contained
 20 on Pages 22 through 25; is that correct?

21 A. Well, actually, since I wrote
 22 the report, I have seen an additional document
 23 that came up, I believe, in Mr. Kellerman's --

24 MR. STAR: Killingsworth.

25 A. (Continuing) -- Killingsworth's

1 deposition earlier this month, that had I seen
 2 that document at the time I wrote my report, I
 3 would have cited that document in here as well.
 4 That document in particular was a listing of
 5 Business One customers that had considerably
 6 larger implementations than Hodell that were up
 7 and running. I certainly would have -- would
 8 have cited that document in this report had I
 9 had it.

10 BY MR. LAMBERT:

11 Q. Can you tell me anything about
 12 the implementations that are referenced in that
 13 document?

14 A. Not beyond what
 15 Mr. Killingsworth testified to, no.

16 Q. Well, what about that document
 17 do you think would have supported your
 18 position --

19 A. That --

20 Q. -- in your opinion?

21 A. I'm sorry, I didn't mean to
 22 interrupt you.

23 That document --

24 Q. What is it about that document
 25 you thought would have supported your opinion,

1 had been -- has expressed certainly at some
 2 point, although I think it wasn't clear -- ever
 3 clear that they expressed it prior to
 4 contracting. In fact, I've seen no evidence
 5 that they expressed it prior to contracting.
 6 But that they have subsequently expressed the
 7 growth potential that they needed.

8 Those -- that information
 9 brought up in that deposition, which occurred
 10 after the date of my report, would certainly be
 11 something that I would have cited as support
 12 for this opinion.

13 Q. Is it your testimony that that
 14 document reflected instances where customers
 15 were utilizing Business One with hundreds or
 16 thousands of concurrent users?

17 A. Yes.

18 Q. Is that what your testimony is?

19 MR. STAR: Objection to the
 20 form.

21 MR. LAMBERT: Okay.

22 MR. STAR: Go ahead and answer
 23 it.

24 A. It -- it's my understanding that
 25 that was a listing of domestic and Canadian

1 opinion number three?

2 A. That document listed large
 3 domestic -- and not even including
 4 international -- domestic and Canada
 5 implementations of Business One that had been
 6 scaled to support hundreds and -- or even
 7 thousands of users, and were, therefore, much
 8 larger than -- than Hodell-Natco ever was
 9 during the period of time that it was using the
 10 amalgam of the In-Flight Enterprise, the Radio
 11 Beacon and Business One.

12 And -- and I believe there was
 13 also some testimony there about the potential
 14 for future scalability based on the Hanna
 15 architecture that would have -- that is
 16 becoming available now and certainly would have
 17 been available to Hodell-Natco during the
 18 ten-year horizon of its -- of its
 19 implementation of this amalgam of -- of add-on
 20 and -- add-ons and Business One.

21 And I probably would have cited
 22 that as well because they both go to show the
 23 fact that the Business One scalability
 24 potential currently and over the ten-year time
 25 horizon certainly encompassed what Hodell-Natco

1 business users, some of whom had several --
 2 many of whom had several hundred and/or over a
 3 thousand concurrent users.

4 BY MR. LAMBERT:

5 Q. Okay. Operating on the same
 6 Business One's version that Hodell purchased in
 7 2004?

8 MR. STAR: Objection to form.

9 A. I -- I did not say that they
 10 were operating on the same version. It is
 11 normal for users of software such as Business
 12 One to upgrade versions as new versions become
 13 available.

14 It's certainly not -- it would
 15 certainly be expected that Hodell-Natco would
 16 have had that opportunity to upgrade its
 17 versions just like anybody -- just like anybody
 18 else, that there's no stretch there.

19 BY MR. LAMBERT:

20 Q. If you were advising or
 21 consulting with a client that had implemented
 22 business software and was not able to
 23 effectively utilize that software, would you
 24 advise them to wait it out in the hope that
 25 there would be improvements in the -- or

1 upgrades to the software or would you advise
2 them to move on?

3 MR. STAR: Objection to the
4 form.

5 You can answer it if you
6 understand it.

7 A. You have to look on a
8 case-by-case basis and what the issues were.
9 In some cases, I might recommend that they move
10 on. In other cases, I might recommend that --
11 that they stick with it.

12 And in this case, we're not
13 talking about a particular Business One-only
14 implementation. We're talking about an
15 amalgam, a combination of Business One, the IFE
16 add-on and the Radio Beacon add-on.

17 Every case is unique. I can't
18 give you an -- an answer that would apply in
19 any specific case without knowing the details
20 of that case.

21 BY MR. LAMBERT:

22 Q. Is it your testimony, though, in
23 this case, that Hodell, rather than moving to
24 Prophet 21, should have waited out its problems
25 with Business One and on the assumption that

1 out or not. A business' dissatisfactions are
2 their own dissatisfactions, whether they're
3 reasonable or -- or unreasonable.

4 We're -- we're not talking
5 specifically about Business One here, however.
6 We're talking about this combination of
7 Business One with the two add-ons. And while
8 Business One's scalability and the potential
9 for growth of Business One, the size of
10 which -- there's no indication that Business
11 One without the add-ons was unsatisfactory for
12 Hodell or unable to perform as -- as it should
13 perform. It's the combination of Business One
14 with these -- with the add-on.

15 There are so many factors that I
16 haven't looked into there that, you know, if it
17 had strictly been the Business One alone wasn't
18 quite as fast as Hodell -- or Hodell had some
19 concern that Business One alone without the
20 add-on would not be able to expand, in the
21 ten-year horizon that they had been concerned
22 about, to the size they might need in that
23 ten-year horizon, understanding that even as of
24 today they've gone -- expanded beyond what they
25 were when they had this combination, it would

1 the Business One software would be upgraded and
2 improved over time?

3 MR. STAR: Objection to form.

4 A. That's not an issue that I have
5 been asked to look into. But -- but I think I
6 might be able to -- to give you some -- some
7 comment on that.

8 There is certainly a divergence
9 of testimony and opinion as to how satisfactory
10 this software was over the period of time that
11 Hodell-Natco used it.

12 Obviously, any businessperson
13 has the option at any time to decide to stay
14 with something or not to stay with something.
15 That's the business's decision to make.

16 What might be perfectly adequate
17 performance in general might be unacceptable
18 for entirely unusual reasons to any particular
19 business. So you'd have to look at what it --
20 what all the factors would be that would affect
21 this.

22 I'm not in a position to say
23 whether -- whether Hodell-Natco -- whether
24 their dissatisfactions were something that
25 they -- that I would have recommended they wait

1 certainly be reasonable to keep using it with
2 the promise of the Hanna improvements to
3 accommodate the future growth when that future
4 growth occurred.

5 But what the -- what the
6 decision should have been -- what the decision
7 should have been for this combination un --
8 that's -- that's not something that I've got
9 enough information to -- to make a
10 recommendation and haven't -- I don't have an
11 opinion on that. I haven't tried to state an
12 opinion on that.

13 BY MR. LAMBERT:

14 Q. So the short answer to my
15 question is, no, you're not going to offer
16 testimony on that subject at trial?

17 A. I have no plans to offer
18 testimony on whether they should have waited it
19 out at trial.

20 You have to make the distinction
21 between Business One alone, which is the SAP
22 product.

23 Q. I didn't ask that. I just asked
24 a yes or no answer.

25 A. Okay.

1 MR. STAR: Let's take a break
 2 when you've got a minute, when you get to
 3 a spot.

4 MR. LAMBERT: Yes. Can we talk
 5 for a second, Greg?

6 MR. STAR: Sure.

7 THE VIDEO TECHNICIAN: Off the
 8 record?

9 MR. STAR: Yes.

10 THE VIDEO TECHNICIAN: Off the
 11 record at 11:40.

12 ---
 13 (Whereupon, a recess was taken
 14 from 11:40 a.m. to 11:52 a.m.)

15 ---

16 THE VIDEO TECHNICIAN: Back on
 17 the record at 11:52. Beginning of tape
 18 number three.

19 BY MR. LAMBERT:

20 Q. In the course of rendering
 21 opinion number three, did you speak with anyone
 22 at SAP for purposes of preparing that
 23 particular part of your report?

24 A. I don't recall having done so.
 25 I don't believe so.

1 Q. Okay. Turn to Page 25, opinion
 2 number four.

3 A. Okay.

4 Q. Opinion number four is,
 5 "Although the SAP Business One software had a
 6 marketing focus on smaller companies, that does
 7 not imply that it was incapable of running
 8 satisfactorily for companies the size of
 9 Hodell."

10 Can you tell me what assumptions
 11 you made or relied upon in rendering opinion
 12 number four?

13 (Pause)

14 A. I don't see any in par -- any in
 15 particular, nothing that I haven't -- that I
 16 haven't stated.

17 Q. You're not aware of any
 18 assumptions that you made in rendering opinion
 19 four based upon your review here?

20 A. I may not have stated here,
 21 although I did state elsewhere in the report,
 22 that -- and earlier in my deposition, that as a
 23 marketing -- that I have been a marketing
 24 executive for computer products. And I relied
 25 to some extent on my knowledge of -- of -- and

1 experience as a marketer of computer products
 2 and -- and reviewing what other marketers of
 3 computer products have done. But nothing
 4 specific.

5 Q. You're not assuming any facts or
 6 evidence in opinion number four that aren't
 7 stated in your report; is that accurate?

8 A. I -- I've really tried to
 9 footnote all of the facts that I've relied on
 10 as best I can. And as I mentioned, in some
 11 cases I've used exemplary citations and there
 12 are others. But I've really tried my best
 13 to -- to identify everything I've relied on.

14 Q. Okay. Can you turn to 28,
 15 opinion number five.

16 Again, opinion number five is,
 17 "LSI and Hodell's neglect of technical warnings
 18 known to one or, in some cases, both of them
 19 before and after Hodell licensed the SAP
 20 Business One software, without getting normal
 21 guidance from SAP and without taking normal and
 22 customary actions to avoid potential problems
 23 was a major factor causing the SAP Business One
 24 software not to perform up to Hodell's
 25 expectations."

1 My question is, is there any --
 2 have you made any assumptions in the course of
 3 rendering opinion number five that aren't
 4 contained in your report?

5 A. Only that the -- in the cases
 6 where I relied on testimony of individuals,
 7 only that they were testifying accurately and
 8 honestly.

9 Q. Okay. And the basis for your
 10 opinion number five is as set forth in Pages 28
 11 through 30; is that accurate?

12 A. Yes. Yeah, that's why I do
 13 this.

14 Q. Okay.

15 MR. STAR: You mean that's why
 16 you wrote a report?

17 THE WITNESS: Yes, that's why I
 18 write a report with explanation of what
 19 the opinions are and footnote the support
 20 for that explanation.

21 BY MR. LAMBERT:

22 Q. I'm just trying to get -- you
 23 know, again, I'm just trying to get an
 24 understanding of what your opinion is and what
 25 the basis for it is.

1 On Page 30, opinion number six,
 2 can you let me know what, if any, assumptions
 3 you made or relied upon in rendering opinion
 4 number six?

5 A. I'll take a look.

6 (Pause)

7 No. I think I have explained --

8 I don't see any assumption. I think I've
 9 explained the support for opinion number six as
 10 best I could and -- and cited the -- the facts,
 11 documents and testimony at least with
 12 exemplary, but sufficient ex -- citations for
 13 the support for that -- that opinion.

14 Q. Okay. Page 34, opinion number
 15 seven, the same question: Are there any
 16 assumptions that you're making or relying upon
 17 in the course of rendering opinion number seven
 18 that you want to let me know about?

19 (Pause)

20 A. No assumptions that I can
 21 identify. And I believe that the support for
 22 the opinion is amply explained and -- and
 23 cited.

24 Q. Are you aware of whether Hodell
 25 made any changes to its infrastructure hardware

1 capabilities at any time?

2 A. I'm aware that they did, yes.

3 Q. Are you aware of whether that
 4 had an effect on the performance of the
 5 software solution?

6 A. The documents that I saw
 7 indicated that -- that the improvements to the
 8 infrastructure did, in fact, result -- well,
 9 there were a number of things going on. SAP
 10 was providing support. LSi was providing
 11 support. Infrastructure changes were going on.

12 All of these things were going
 13 on more or less concurrently. And there was
 14 noted and notable improvement over the months
 15 that followed the go-live in the spring of
 16 2007.

17 And in -- you know, how much of
 18 that is attributable to the infrastructure --
 19 since it was all going on concurrently, how
 20 much of it is attributable to the
 21 infrastructure improvements as opposed to
 22 the -- the software adjustments and so forth, I
 23 don't think I've seen any evidence that would
 24 isolate what was attributable to what.

25 But, certainly, there -- there

1 were improvements that occurred during the same
 2 time period as these infrastructure changes and
 3 enhancements occurred.

4 Q. You had a reference in here to
 5 an SAP sizing guide.

6 A. I believe so, yes.

7 Q. Do you know whether the
 8 equipment that Hodell had installed to run
 9 Business One and In-Flight was -- complied with
 10 the sizing guide?

11 MR. STAR: Objection to form.
 12 I'd also note that notwithstanding our
 13 numerous requests, Hodell has
 14 continuously refused to produce its
 15 internal documentation, including
 16 documents from Joe Vislocky, which
 17 apparently have been collected and
 18 reviewed by counsel, but not ever
 19 provided to us.

20 Go ahead and answer.

21 MR. HULME: I'm sorry, could you
 22 repeat that? I couldn't hear you, Greg.

23 MR. STAR: Roy, I objected --

24 MR. LAMBERT: Let's have a
 25 discussion -- let's not take up time here

1 doing that. Let's just -- come on.

2 MR. STAR: Fine. Go ahead.

3 It's on the record.

4 A. I didn't see, nor did Mr. Gumbel
 5 note details with regard to the compliance of
 6 the infrastructure that was originally in place
 7 or certainly comprehensive information
 8 regarding the details of the infrastructure
 9 that was in place during 2007 and 2008.

10 And I don't know necessarily
 11 that the sizing guide encompassed all of the
 12 issues that I -- and particularly the use of
 13 the telephone wire or what's referred to as
 14 "silver satin cable," which was -- would be so
 15 far out of compliance with almost any known
 16 infrastructure during this time period, that it
 17 probably wouldn't -- and I didn't see it in the
 18 sizing guide.

19 So I -- I don't have enough
 20 information from Hodell to de -- to make that
 21 determination of -- of whether Hodell's
 22 infrastructure complied in every respect. But
 23 we certainly -- I certainly saw areas where it
 24 could not have -- could not have complied.

25 BY MR. LAMBERT:

1 Q. Would you agree with me that if
 2 the items you identified in opinion number
 3 seven as not being -- as being antiquated or
 4 inadequate, if those items were corrected or
 5 addressed at some point, then they were not
 6 necessarily the cause of any performance
 7 problems Hodell experienced with the software?

8 MR. STAR: Objection to form.

9 A. By "the software," you mean the
 10 amalgamated combination of the IFE, Radio
 11 Beacon and Business One, or are you referring
 12 just to Business One?

13 BY MR. LAMBERT:

14 Q. Sure.

15 MR. STAR: Sure what?

16 BY MR. LAMBERT:

17 Q. The whole solution. The entire
 18 solution.

19 A. Okay. Ask -- ask the question
 20 again.

21 Q. Would you agree with me, though,
 22 that if the items you've addressed here in
 23 opinion number seven were, in fact -- assuming
 24 that they were actually inadequate or
 25 deficient, let's assume that they were

1 true, that wouldn't necessarily have anything
 2 to do with SAP Business One itself, it would
 3 have to do, as -- as you asked me, about the
 4 combination of Business One with the
 5 LSi-supplied add-ons.

6 Q. The basis for your opinion in
 7 opinion number seven appears to me to be
 8 primarily the deposition transcript of Joe
 9 Guagenti and Marcia Weissman; is that correct?

10 A. Well, there are -- there are
 11 also some cited and Bates numbered documents.
 12 But I've cited a number of things that were
 13 from those two depositions, yes.

14 Q. Okay. Can you turn to Page 36,
 15 opinion number eight.

16 Are there any assumptions that
 17 you've made in the course of rendering opinion
 18 number eight?

19 A. I don't believe so.

20 Q. No assumptions? And the basis
 21 for opinion number eight is set forth on
 22 Pages 36 and 37?

23 A. Yes.

24 Q. You make the statement in the
 25 first paragraph on Page 36 that SAP "responded

1 addressed by Hodell and that after they were
 2 addressed, did not result in any material
 3 improvement, you would agree with me that those
 4 item weren't the cause of their performance
 5 problems, wouldn't you?

6 A. Well, you've asked me to make
 7 assumptions that I don't think are necessarily
 8 warranted assumptions. I have no idea whether
 9 all of the issues that -- that I have noted
 10 were adequately addressed.

11 I do know that there were
 12 improvements in performance. So that the
 13 hypo -- if, hypothetically, all you said was
 14 true, then -- which I don't agree that it is --
 15 but if hypothetically it were, then -- and if
 16 there were no improvement in performance,
 17 which, in fact, is contrary to my understanding
 18 of what the actual facts are, then under those
 19 circum -- those limited circumstances, which I
 20 don't agree to, I might agree with you.

21 But the assumptions are not
 22 verifiable ones, not assumptions that I would
 23 make and are contrary to the evidence that
 24 I've -- that I've seen.

25 And -- but even if that were

1 in a manner that, for the most part, far
 2 exceeded the standard of care."

3 A. Yes.

4 Q. "For the most part," is that a
 5 qualifier? Does that mean in some instances,
 6 you think that SAP did not respond in a manner
 7 that was with the standard of care?

8 MR. STAR: Objection to form.

9 A. Well, I think it responded in a
 10 manner which complied with the standard of
 11 care. And for the most part, it exceeded it.

12 But I wouldn't -- and I didn't
 13 find any instances where it failed to comply
 14 with the normal standard of care.

15 I wouldn't necessarily say that
 16 it necessarily exceeded that standard of care
 17 in every aspect. But it certainly complied
 18 with it in every aspect and exceeded it in
 19 many.

20 BY MR. LAMBERT:

21 Q. Can you articulate for me what
 22 the standard of care is?

23 A. Well, the standard of care is
 24 supporting the customer, as stated in the -- in
 25 the license and/or support agreements,

1 providing a level of responsiveness in doing so
 2 commensurate with the needs of the customer.
 3 Being willing to -- well, I think being willing
 4 to go the -- the extra mile and doing support
 5 even when that support was, although
 6 contractually required to have been paid for,
 7 was not paid for.

8 I mean, doing what SAP did had
 9 it been paid, as contractually agreed, would
 10 have been -- would have met the standard of
 11 care. Everything that -- that SAP did would
 12 have been consistent with what professional
 13 software companies do.

14 Doing so when it wasn't being
 15 paid for and then going the extra mile and
 16 attempting to resolve problems with add-ons, to
 17 the extent that they were allowed to have
 18 access to them, would be going beyond the
 19 standard of care.

20 Q. I want to ask you a couple of
 21 questions about your opinion number two on
 22 Page 18.

23 A. Certainly. Let me turn back to
 24 that.

25 Okay.

1 I was trying to address with this sentence.
 2 Q. You make the statement, "both
 3 companies had to have been familiar with
 4 software licensing."

5 Can you tell me what that's
 6 based on?

7 A. Let me look in context. Where
 8 is that on the first page? I know I said that,
 9 but . . .

10 Q. It's the second sentence of that
 11 first paragraph under opinion number two.

12 A. Oh, yes. There is undisputed
 13 testimony that Hodell had licensed FACTS from
 14 IBIIS, which became part of -- of LSI.

15 And as I stated to you earlier,
 16 I'm familiar with the way FACTS -- the way
 17 FACTS is sold and the licensing of FACTS. And,
 18 also, there's testimony that pre -- prior to
 19 that, it had licensed another product, I
 20 believe a MicroData product, which is also a
 21 product that I have some familiarity with.

22 So it's based on the fact that
 23 LSI wasn't -- was a business partner for FACTS
 24 and had been involved with the licensing of
 25 FACTS to Hodell and that Hodell had, in fact,

1 Q. The first -- the first sentence
 2 of that opinion states -- I'm going to
 3 summarize it for you, but you can read the
 4 whole thing if you want -- that it's the normal
 5 custom and practice for a license agreement to
 6 be signed before any final commitment to
 7 acquire the license to use it.

8 Is that accurate?

9 A. I don't have any problem with
 10 your characterization so far.

11 Q. Is it your opinion that Hodell
 12 actually did not sign a license agreement
 13 before making its final commitment to acquire
 14 Business One?

15 A. There has been testimony from
 16 Hodell that it considered that it had made a
 17 commitment to Business One prior to
 18 December 2005. I don't believe it did make a
 19 commitment to acquire Business One until it
 20 signed the license agreement in December of
 21 2005.

22 But there are statements in
 23 depositions by Hodell-Natco employees to the
 24 effect that they felt they had made such a
 25 commitment prior to that date. And that's what

1 licensed FACTS and had licensed the -- I
 2 believe it's the MicroData product before that.

3 Q. Okay. Based upon -- I'm going
 4 to try to just address your opinion with
 5 respect to Hodell's conduct here. I understand
 6 you have an opinion with respect to LSI's
 7 conduct as well.

8 But with respect to Hodell, your
 9 opinion is based upon its -- its licensing of
 10 these two prior software products?

11 A. Yes, primarily. I -- yes.

12 Q. I'm sorry, I didn't hear the
 13 last part.

14 A. I said primarily. But I
 15 guess -- I can't think of anything else. It --
 16 it would be based on its licensing of those two
 17 products.

18 Q. You make the statement at the
 19 bottom of Page 18, "SAP was totally unaware of
 20 any significant details about Hodell or its
 21 business needs until some significant time
 22 after the license agreement was signed"?

23 A. I do.

24 Q. You don't cite anything in
 25 support of that.

1 Can you tell me what the basis
 2 for that position is?

3 A. Well, I think I expounded on
 4 that a little later and I talked about when SAP
 5 became aware of the details. And I documented
 6 the specific communications that I was aware of
 7 where SAP started to become aware of the
 8 specific details of -- of Hodell and its
 9 business needs.

10 I didn't -- since I went into
 11 greater depth on that later, I didn't footnote
 12 it here.

13 Q. There's a series of bullet
 14 points on the second -- on Page 19.

15 A. Yes.

16 Q. You make the statement in the
 17 third bullet point about Hodell contracting
 18 previously with LSi and was dissatisfied?

19 A. Yes.

20 Q. What's that in reference to?

21 A. Well, I've -- in part, that's
 22 explained in footnotes 18 and 19. But -- and I
 23 don't think I noted there, and I probably
 24 should also -- oh, well, no, I did note
 25 Mr. Reidl's deposition transcript.

1 you asked me for a detail, and I've said
 2 there's -- there's more extensive deposition
 3 testimony than just what I've cited. You asked
 4 me something about things like that before.

5 Q. You make the statement in the
 6 fourth bullet point -- I'm not going to read
 7 the whole thing. But what's your basis for
 8 your conclusion in that fourth bullet point
 9 starting with, "Hodell failed to provide LSi"?

10 A. Well, Ms. Weissman testified
 11 about that, and she was the -- the LSi project
 12 manager, in some detail.

13 I did say, see, for example,
 14 Weissman deposition transcript. And I gave two
 15 places in her transcript. But I believe there
 16 were other LSi -- other testimony of LSi
 17 personnel about that as -- as well.

18 Q. Can you tell me, did you review
 19 all the deposition transcripts in this case or
 20 just selected ones?

21 I'll represent to you that it's
 22 not listed in here.

23 A. I think I reviewed all of the
 24 ones that were available as of August 10th. I
 25 may have reviewed some in greater depth than

1 Mr. Van Leeuwen and Mr. Reidl
 2 both testified about Hodell's contracting with
 3 IBiS to add the In -- the IFE capability to the
 4 FACTS software and the dissatisfaction that
 5 Hodell had with Mr. Van Leeuwen's and IBiS's --
 6 and I was including IBiS as part of LSi, as you
 7 asked me to at the beginning of this
 8 deposition. So I was referring to that
 9 dissatisfaction that Hodell had with the LSi
 10 attempts to develop the IFE capability for
 11 FACTS.

12 Q. Okay. It's your understanding
 13 that Hodell had encountered -- was dissatisfied
 14 with its FACTS IFE solution?

15 A. Yeah. And, actually -- yes.
 16 And, actually, Mr. Reidl had more extensive
 17 testimony on this -- on this point than just
 18 what I've cited there, where he talked about
 19 how he felt that LSi owed him something from
 20 the -- the failed or unsatisfactory attempt to
 21 develop the capability for FACTS and that he
 22 expected concessions on that development from
 23 LSi in their -- in their doing the development
 24 for the add-on to Business One.

25 So there's an example of where

1 others. But I believe as of August 10th, I had
 2 reviewed, and in some cases read and in other
 3 cases searched on keywords, all of the
 4 depositions that had been done up to
 5 August 10th of this year.

6 Q. Your testimony that Hodell
 7 didn't provide LSi with crucial data about what
 8 it would need is based upon primarily
 9 Ms. Weissman's deposition?

10 A. Well, I believe Mr. Van Leeuwen
 11 also was very vague on what he had been told
 12 and what he was aware. And he certainly didn't
 13 contradict Ms. Weissman.

14 And as I say, I did say that was
 15 exemplary. So Van Leeuwen's deposition
 16 would -- would concur with that. And I believe
 17 there was -- I can't recall which ones, but I
 18 believe there was other testimony to that
 19 effect.

20 I thought Ms. Weissman's was the
 21 most explanatory.

22 Q. Okay. Turn to Page 21.

23 A. I'm there.

24 Q. Well, first of all, it starts on
 25 Page 20. There's a lead-up. "Hodell failed to

1 disclose and LSi failed to appropriately
 2 investigate several factors." Then you bullet
 3 point them out on Page 21?
 4 A. Yes.
 5 Q. What's the -- I don't see that
 6 you cite any support for those statements.
 7 Do you know what that's based
 8 on?
 9 A. Yes. These are factors that
 10 I've cited previously as either known to LS --
 11 LSi, such as the previous attempt to -- to do
 12 the In-Flight extensions for FACTS, or unknown
 13 to LSi, such as the things that Ms. Weissman
 14 noted in her deposition and saying that -- that
 15 there is no documentation to support that any
 16 of this was communicated -- these factors are
 17 specifically with regard to what SAP knew. And
 18 you can't cite what isn't there.
 19 But I found no documentation or
 20 testimony of any kind indicating that any of
 21 this had been communicated to SAP.
 22 Q. Okay. So this is what -- when
 23 you say Hodell failed to disclose, you're
 24 saying they failed to disclose these bullet
 25 points to SAP?

1 A. Yes. Let me -- let me read the
 2 whole paragraph. I believe that's -- that's
 3 what I meant to say in the paragraph. But let
 4 me read the whole paragraph.
 5 (Pause)
 6 Yes. Perhaps I didn't express
 7 it as clearly as I could have. But these are
 8 issues that -- that were not -- either weren't
 9 investigated adequately by LSi and, therefore,
 10 were not disclosed to SAP or were -- just may
 11 have been known to LSi, but were not disclosed
 12 to SAP.
 13 Q. Okay. And then the last thing I
 14 want to ask you about this particular opinion
 15 is, there's a statement down at the bottom of
 16 Page 21 where you state that the only specific
 17 SAP knew at the time the license agreement was
 18 signed was that Hodell was in the fastener
 19 industry and potentially would commit to
 20 licensing a 40-user system with growth to 80
 21 users?
 22 A. Yes.
 23 Q. What's that -- what's that based
 24 upon?
 25 A. The items noted in my footnote.

1 Q. The footnote --
 2 A. Twenty-eight.
 3 Q. -- 28 documents?
 4 A. Yes.
 5 Q. It's not your understanding that
 6 Hodell was initially going to be licensing
 7 80 users?
 8 A. Pardon me?
 9 Q. It's not your understanding that
 10 Hodell's initial purchase was going to be 80
 11 users? It's your understanding it was just
 12 going to be 40?
 13 MR. STAR: Objection to form.
 14 A. Well, I believe there was some
 15 communication that there would be an initial
 16 license of 40 and then later an additional 40.
 17 So -- and this was, I believe, a sales forecast
 18 or something, if I recall correctly. But the
 19 documents that I saw, which were the specific
 20 communications from LSi to SAP, only --
 21 indicated only that the initial license would
 22 be 40 and that there would be later growth
 23 to 80.
 24 BY MR. LAMBERT:
 25 Q. Okay. If you turn to Page 22 of

1 your report, I'm going to ask you a couple
 2 questions about opinion three.
 3 A. Okay.
 4 Q. Down at the bottom of Page 22,
 5 you talk about some characteristics that can
 6 affect performance?
 7 A. Yes.
 8 Q. And you use the term, "adequate
 9 responsiveness." And I want to get an
 10 understanding of what you mean by "adequate
 11 responsiveness."
 12 A. Every application is different.
 13 Some applications require essentially immediate
 14 responsiveness.
 15 If, for instance, you have an
 16 application that controls a heart monitor in a
 17 hospital, adequate responsiveness is immediate.
 18 Anything less than immediate is unsatisfactory.
 19 If you have applications that
 20 include providing monthly reports, taking two
 21 or three days to produce that monthly report is
 22 certainly adequate responsiveness for that
 23 particular -- for that particular need.
 24 What's adequate for any given
 25 application or any given customer is a

1 definition that the customer has to make
2 themselves.

3 Q. For Business One, do you have an
4 opinion as to what adequate responsiveness is
5 for the Business One program?

6 A. We're talking Business One here
7 without -- just in general, without the LSi
8 add-ons?

9 Q. Let's do it -- let's -- I guess
10 let's do it two-fold. Let's do it first
11 without add-ons.

12 What would be adequate
13 responsiveness?

14 A. It would really depend on the
15 usage. And you have to -- adequate
16 responsiveness varies from application to
17 application. Adequate responsiveness for
18 entering a 200-line item order is different
19 than adequate responsiveness for entering a
20 two-line item order. Adequate responsiveness
21 for producing an end-of-month report is
22 different than adequate responsiveness for
23 doing an ad hoc query.

24 I can't really answer your
25 question. And I guess it would probably be the

1 process a transaction, is that adequate
2 responsiveness?

3 A. If you're talking about a
4 400-line item order, it might well be adequate
5 responsiveness. If you're talking about a
6 three-line item order, probably not.

7 Q. Okay. In the process of
8 rendering opinion number three, I think you've
9 stated that you didn't speak with anyone
10 employed by SAP to prepare that opinion?

11 A. I don't recall having done so.

12 Q. Did you consult with or speak
13 with anyone else in the course of rendering
14 opinion number three?

15 A. No.

16 Q. You make the statement on
17 Page 23, that first paragraph, that
18 "theoretical factors are not as reliable as
19 actual measured results."

20 Do you see that --

21 A. Yes.

22 Q. -- particular statement?
23 What are you talking about with
24 respect to adequate measured results -- or
25 "actual measured results"? I'm sorry.

1 same for with or without the, yeah, In-Flight
2 extensions.

3 The adequate responsiveness
4 really depends on what portion of Business One
5 or the combination of Business One, the
6 extensions you're talking about, and what the
7 particular requirements of the user are.

8 But whatever that adequate is,
9 the ability of any system, with or without
10 add-ons to meet it, is dependent on the factors
11 that -- that I -- that I cite.

12 Q. Have you ever heard of the
13 concept that the system should be waiting on
14 the user, the user shouldn't be waiting on the
15 system?

16 A. I -- I've -- I'm not sure
17 whether I've ever heard of it. I wouldn't
18 necessarily agree with it in all -- in all
19 circumstances.

20 That's certainly not, in my
21 experience, the -- the standard to which I, as
22 a consultant to a user, would necessarily hold
23 a system that I was considering recommending to
24 that user.

25 Q. What about one to two minutes to

1 A. Well, I'm making a general
2 statement. And I think the words speak for
3 themselves.

4 It seems to me that --

5 Q. Are you talking about --

6 A. It seems to me that Mr. Gumbel
7 relied to a great extent in his expert report
8 on theoretical factors. And I'm making a
9 general statement that that's not as reliable,
10 in my experience, as what actually happens.
11 And I'm just stating that generally.

12 Q. Okay. And then with respect to
13 this case in particular, though, are you saying
14 that the information that Mr. Gumbel did not
15 consider that is more reliable are -- is the
16 information contained in these three bullet
17 points?

18 A. Well, in general, the infor --
19 the observations and measurements by
20 Mr. Barnea, Mr. Neveux and Mr. Woodrum, these
21 bullet points are some of the specifics where
22 they describe those observations. They also
23 talked about them in their -- in their
24 depositions. But, in general, I'm relying on
25 the observations of those three individuals.

1 Q. Okay. And those are the actual
2 measured results you're referring to up above?

3 A. I wouldn't call those actual
4 measured results either, but I would call them
5 actual observations.

6 Q. Okay.

7 A. And documented --

8 Q. Are there any others?

9 A. -- documented contemporaneous
10 observations.

11 There was nothing produced by
12 any party -- and Hodell would be the party that
13 would have the ability to do so. So there was
14 nothing produced by Hodell that contradicted
15 the observations of -- of these three
16 individuals.

17 And there's nothing that you
18 could rely on about the performance,
19 particularly the performance specifically of
20 Business One, without the -- the LSi add-ons.

21 There's really no evidence, no
22 hard evidence, that I could rely on or that Mr.
23 Gumbel could rely on. But the observations
24 that were there would contradict Mr. Gumbel's
25 judgment.

1 Q. Okay. My question is, other
2 than these three individuals' observations, and
3 there's a reference to the sizing guide, so
4 other than those three observations and your
5 reference to the sizing guide, are there any
6 other observations or measured results that
7 you're relying upon to state that Mr. Gumbel's
8 position is not correct?

9 A. Well, I'm relying on the fact
10 that he -- I'm basically saying that he had no
11 evidence at all that he relied on.

12 Q. Okay.

13 A. And I'm provide --

14 Q. I get that.

15 A. Yeah. I'm providing --
16 unfortunately, Hodell -- neither Hodell nor LSi
17 provided any evi -- any significant evidence
18 here. And it was certainly within Hodell's
19 ability and power to provide such evidence.

20 And so without the evidence, all
21 I -- all I have is the sizing guide test and
22 the -- the observations. And those --
23 particularly with the observations, they're
24 certainly limited, because in some cases they
25 included the IFE add-ons, in some cases they

1 didn't.
2 My -- my opinion was, there's no
3 support for what Mr. Gumbel said. I'm not
4 trying to take a contrary -- make a contrary
5 opinion to his. I'm just saying that -- that
6 there's no support for what he said. And, in
7 fact, what I see --

8 Q. Is it fair to summarize that in
9 your --

10 A. What I see contradicts it.

11 Q. Okay. Is it fair that you're
12 not prepared to testify at trial that you're
13 certain Business One could have scaled to a
14 size -- to a business the size of Hodell.
15 You're just saying that there's no support for
16 Mr. Gumbel's position that it cannot?

17 A. Given the complexity of this
18 case and the -- and the combination of the
19 Business One software with the add-ons, there's
20 no way that I, or I believe anyone, could make
21 any guarantee of what level of scalability
22 the -- the system has.

23 The -- I did mention to you
24 earlier about the additional evidence that came
25 up during Mr. Killingsworth's deposition that I

1 didn't cite here, which would also add to what
2 I did cite here, and that I would have -- would
3 have included.

4 But even with that, given the
5 combination of -- of all of the -- the Business
6 One software with add-ons, there's no way that
7 I would attempt to testify that that
8 combination would -- would scale up to what
9 Hodell's expectations might be.

10 Q. Mr. Gumbel's opinion, though,
11 correct me if I am wrong, but was that Business
12 One itself, keeping everything else over here,
13 that Business One itself would -- performance
14 would degrade and would not be successful with
15 a business the size of Hodell.

16 Do you have an opinion on that?

17 A. Yes. My opinion is that
18 that's -- that's wrong and as -- as
19 indicated by the items I've cited and as
20 indicated by the items that came up during
21 Mr. Killingsworth's deposition.

22 Q. So it's your opinion that
23 Business One by itself is capable of scaling up
24 to -- and I'm not talking about the version of
25 Business One that is coming out or is available

1 or will be available at some point in the
 2 future. I'm talking about the Business One
 3 software that Hodell purchased and implemented
 4 and went live on.

5 Is it your testimony that that
 6 Business One software was capable of scaling up
 7 to a business the size of Hodell?

8 A. Well, it was certainly in use in
 9 businesses larger than Hodell as Business One
 10 by itself.

11 I don't think the qual -- I
 12 disagree with the qualification that you've
 13 added in that the size that Hodell was looking
 14 to grow to was over a ten-year time frame. And
 15 it is normal for Business One customers or
 16 customers of any ERP software to upgrade the
 17 versions that they have over the -- over a
 18 ten-year time frame. In fact, it would be
 19 extremely unusual for customers of ERP software
 20 not to upgrade software over a ten-year period.

21 So I think excluding the
 22 capabilities that were deliverable during the
 23 course of that ten-year period as upgrades to
 24 the version that Hodell licensed, that's not a
 25 valid exclusion.

1 software is being -- is growing over time and
 2 that we expect you will be upgrading it as it
 3 grows. And if you are telling us that at some
 4 point in the distant future, you expect to have
 5 300 or 500 users, and that time frame is over a
 6 ten-year -- a ten-year time frame, it's our
 7 expectation, but not necessarily our guarantee,
 8 that there will be no problem in the Business
 9 One software scaling over that time frame.

10 But to speculate -- I don't know
 11 that I can really speculate what the --
 12 according to the -- to the hypothetical you've
 13 given me because it's so contrary to what I
 14 understand to be in evidence.

15 Q. Well, maybe we'll just do it as
 16 a general hypothetical then.

17 If you're consulting for a
 18 client and you're telling a potential vendor
 19 that my client is going to go live with ten
 20 users, but they expect the -- over the useful
 21 life, to go up to a hundred users and the
 22 software vendor knows that it cannot scale --
 23 the current version does not scale up to a
 24 hundred users, but that it might at some point
 25 in the future, do you expect that to be

1 Q. Well, should Hodell -- I want
 2 you to assume that Hodell told SAP that it
 3 intended to scale up to 300 users.

4 Should SAP have told Hodell that
 5 the version they were buying could not scale
 6 that high, but that maybe there would be
 7 improvements in the software over the ten-year
 8 period that would enable it to?

9 MR. STAR: Objection to form.

10 A. There's no evidence that --
 11 that -- of the hypothetical that you've raised,
 12 absolutely no evidence of that hypothetical at
 13 all.

14 And you want me to speculate on
 15 an answer based on a -- a -- an assumption that
 16 I don't agree with? Is that what you're
 17 asking?

18 BY MR. LAMBERT:

19 Q. I do.

20 A. I think it would be entirely
 21 consistent with the customs and practices of
 22 the industry. Had this situation which didn't
 23 occur, had it occurred, it would be entirely
 24 consistent with the custom and practices of the
 25 industry for SAP to have said to Hodell this

1 disclosed to your client?

2 MR. LAMBERT: Objection to the
 3 form.

4 But go ahead and answer.

5 A. Over what time frame?

6 BY MR. LAMBERT:

7 Q. Before they made the purchase,
 8 sir --

9 A. No. They -- they would --

10 Q. -- would you expect them to
 11 be --

12 A. They would grow from ten to a
 13 hundred over what time frame?

14 Q. What do you consider to be the
 15 useful life of an ERP software? I consider it
 16 to be seven to ten years.

17 A. We'll take seven to ten years.

18 If -- if -- I think it would be consistent with
 19 the customs and practices of the industry, and
 20 I would -- as a consultant, I would expect a
 21 vendor to either tell me or not tell me if they
 22 had developments under way that over that
 23 seven- to ten-year time frame would allow the
 24 software to scale to that size, I would expect
 25 them to -- to respond to me by telling me that

1 they had -- if they were empowered to do so,
 2 that they had such development under way.
 3 And as a consultant, I would --
 4 I would weigh how -- I would weigh their answer
 5 and the specificity they gave that answer to me
 6 in deciding whether that was an adequate
 7 assurance.

8 And it might be --

9 Q. You would agree with me that --

10 A. -- for some clients and it might
 11 not be for others.

12 Q. You would agree with me, though,
 13 that them telling you in the first instance
 14 that the current version would not be
 15 appropriate or scalable to a hundred users
 16 would be material to your decision, correct?

17 MR. STAR: Objection to form.

18 Asks for a legal conclusion.

19 A. If I knew for a fact, which is,
 20 of course, contrary to the facts in this case,
 21 but if I knew for a fact or if the vendor knew
 22 for a fact that scaling to "X" number of users,
 23 whatever that is, was not within the capability
 24 of -- of a software package under any
 25 circumstance, I would expect if that -- if I

1 had asked that question of that vendor, I would
 2 expect them to give me an honest answer.

3 BY MR. LAMBERT:

4 Q. What if -- what if they were
 5 unsure of whether it could scale to that user
 6 level, but say that you said I'm going to be
 7 purchasing Business One for my client, they are
 8 looking at purchasing Business One for my
 9 client, they are going to need ten users
 10 initially, but they plan to go up to a hundred,
 11 and SA -- would you expect SAP to tell you that
 12 they didn't know whether it could go up to a
 13 hundred users?

14 MR. STAR: Objection to the form
 15 of the question. You've -- are you back
 16 to a specific question about the facts of
 17 this case or are you relying on
 18 hypotheticals? What are we doing here?

19 MR. LAMBERT: This is a
 20 hypothetical.

21 BY MR. LAMBERT:

22 Q. If you were consulting with a
 23 client and you went to SAP and said, I'm
 24 looking at going live with ten users, but over
 25 the useful life I want to go to a hundred

1 users, would you expect SAP to tell you, I'm
 2 not -- the current version, we don't know
 3 whether that current version could go to a
 4 hundred users?

5 MR. STAR: Objection to form.

6 A. You're asking me to answer a
 7 hypothetical that, to my knowledge, is contrary
 8 to fact.

9 In fact, Business One has scaled
 10 to well over a hundred users. The -- the list
 11 that was produced in Mr. Killingsworth's
 12 deposition shows that it scales to well over
 13 300 or 500 users under certain -- you know, for
 14 various clients.

15 So I -- you're asking for a
 16 hypothetical that's contrary to what I know to
 17 be true.

18 BY MR. LAMBERT:

19 Q. I'm just trying to use numbers
 20 that are simple. I'm not using those as
 21 numbers that have any relation to this case.
 22 I'm trying to just use simple numbers that we
 23 can all understand. That's the only reason I
 24 threw out those numbers.

25 I understand your position that

1 Business One can scale up to a thousand users,
 2 whatever you think. But I'm trying to just use
 3 a simple hypothetical here for purposes of
 4 finding out what your opinion is. Okay?

5 And that hypothetical is, if you
 6 were approaching SAP on behalf of a client and
 7 asked them or informed them that you were going
 8 to be going live with ten users on Business
 9 One, but that you expect to go up to a hundred
 10 users on Business One over the useful life, if
 11 SAP was unsure or did not know whether it could
 12 scale -- Business One could scale up to a
 13 hundred users, whether SAP should tell you
 14 that. That's the hypothetical.

15 MR. STAR: Objection to form.

16 A. I would expect that the vendor
 17 should be honest with me.

18 BY MR. LAMBERT:

19 Q. And would being honest -- part
 20 of being honest would be informing you that
 21 they did not know whether Business One could
 22 scale up to a hundred users at that time, at
 23 that point in the future?

24 MR. STAR: Objection to form.

25 A. When you start bringing up

1 Business One and when you start bringing up
 2 numbers of users, the -- you blur the
 3 distinction between the hypothetical and the
 4 actual facts.

5 What I'm saying is, as a -- as a
 6 consultant to buyers and as a buyer, whatever
 7 the numbers are and whatever the product is, I
 8 would expect the vendor to be honest in
 9 answering my questions, answering the questions
 10 that I put specifically to that vendor.

11 I wouldn't --

12 BY MR. LAMBERT:

13 Q. I understand --

14 A. I wouldn't expect them to be
 15 honest in answering a question that I never
 16 asked.

17 Q. Well, I want to -- I understand
 18 that the vendor should be honest. I think
 19 that's something we can all agree on.

20 You don't have an answer to my
 21 hypothetical? You don't know what you would
 22 expect the vendor to tell you --

23 MR. STAR: Wait a minute.

24 BY MR. LAMBERT:

25 Q. -- in response to that question?

1 MR. STAR: Now you're being
 2 argumentative. He has answered the
 3 question the best way that he can. And
 4 that's the answer.

5 MR. LAMBERT: No. He hasn't
 6 answered it at all.

7 MR. STAR: Well, your opinion of
 8 that is different than mine. And the
 9 witness has given you the answer.

10 If you have a different answer,
 11 you can elaborate further.

12 A. I have no different answer.

13 When you bring up specific
 14 products and specific numbers and specific
 15 vendors, you blur the distinction between the
 16 hypothetical and the actual. And --

17 BY MR. LAMBERT:

18 Q. Okay.

19 A. -- the best way I can answer
 20 that is the way I have. I have no better
 21 answer.

22 Q. So I'll ask it this way: You're
 23 shopping vendors for a client and you go ask
 24 vendor "X" --

25 A. Yes.

1 Q. -- that -- you tell them your
 2 client is going live with ten users and expects
 3 to go up to a hundred over the useful life of
 4 the system. Vendor "X" knows that the current
 5 soft -- vendor "X" is not sure whether the
 6 current version of its software can go up to a
 7 hundred users, but thinks it might be able to
 8 at some point in the future.

9 Should that information be
 10 disclosed to you prior to the purchase?

11 MR. STAR: Objection. I'm not
 12 going to let him answer that question.

13 You're trying to ask him for
 14 effectively a legal conclusion here. And
 15 I don't think that's an appropriate
 16 hypothetical, to try to get this witness,
 17 who is not a legal expert.

18 I mean, I see what you're trying
 19 to do. You're effectively trying to get
 20 him to tell you that there is some duty
 21 of disclosure where somebody asks some
 22 irrelevant question. That's not an
 23 appropriate hypothetical.

24 I mean, there are hypotheticals
 25 that you can ground in --

1 MR. LAMBERT: It absolutely is.

2 MR. STAR: No, I don't agree. I
 3 mean, if you want to try to rephrase it,
 4 go ahead. I think he's answered your
 5 questions, though.

6 But go on. That one's not
 7 appropriate.

8 MR. LAMBERT: Yes, it absolutely
 9 is appropriate. He's testified that he
 10 has consulted with, what, thousands of
 11 clients on the purchase and
 12 implementation of business software.

13 I'm asking him to render an
 14 opinion as to whether he would expect
 15 certain information to be disclosed to
 16 him as part of that consultation.

17 And he's perfectly capable of
 18 answering what his opinion as a
 19 testifying expert would be as to what
 20 should be told to him in the purchase of
 21 ERP software.

22 So -- and that it's a very
 23 simple hypothetical. It's not
 24 complicated whatsoever.

25 BY MR. LAMBERT:

1 Q. The question is, if you're
 2 purchasing -- if you're deciding whether to
 3 purchase ERP software and the vendor knows that
 4 you expect that software to be able to
 5 accommodate "X" number of users in the future,
 6 and the vendor isn't sure whether it can,
 7 whether you, as acting on behalf of the
 8 purchaser, would expect that information to be
 9 told to you? That's the simple question.

10 MR. STAR: Same objection.

11 You can answer if you
 12 understand.

13 A. First of all, I never said
 14 thousands of -- of businesses that I've
 15 consulted. I've consulted hundreds of
 16 businesses. We've evaluated -- and I've
 17 evaluated thousands of software packages or
 18 certainly on the order of a thousand software
 19 packages, just for clarification.

20 And the answer is, you didn't --
 21 you have not phrased that as a specific
 22 question. And so I'll give you the general
 23 answer that my expectation as a consultant is
 24 that depending on what the question -- the
 25 specific question that I ask is, I would expect

1 the vendor to give me a truthful answer.

2 BY MR. LAMBERT:

3 Q. And if the specific question
 4 was, I'm going live with ten users on product
 5 "X," and I expect to go up to a hundred users
 6 on product "X", will that work for me, and they
 7 know that they're not sure it can go up to a
 8 hundred, the vendor knows it's not sure that
 9 product "X" can go up to a hundred users, would
 10 you expect that to be disclosed to you in
 11 response to that question?

12 A. I would expect them to say, I'm
 13 not in a position to commit. I can't rule out,
 14 but I'm not in a -- in a position to commit
 15 that the software as it's deliverable today
 16 will do a hundred users.

17 However, if you're talking about
 18 going to a hundred users seven years from now,
 19 it's my expectation, without guarantee, that
 20 the software will -- will do that, if that's
 21 what the vendor believes to be the truth.

22 Q. Okay. You make the statement at
 23 the top of Page 24 about long -- a discussion
 24 about long orders.

25 A. At the top of Page 24?

1 MR. STAR: It's "91-line item
 2 order."

3 A. (Continuing) Oh, yes.
 4 BY MR. LAMBERT:

5 Q. You say that's not something the
 6 software company could reasonably anticipate?

7 A. Not as a normal case. I
 8 mentioned to you that I've consulted to
 9 hundreds of clients on the selection of
 10 computer software. Probably distribution
 11 companies are the most common type of client
 12 that I've -- I've had from 1980 to the present.
 13 I've worked with, literally, dozens of
 14 companies that do distribution.

15 It is my experience that the
 16 average -- that typical orders for distribution
 17 companies are five to 25 line items, usually
 18 toward the bottom of that range.

19 For a software company to expect
 20 average orders to be well above that range is
 21 not something that any customer should expect
 22 would normally be the case.

23 Q. So your testimony, that Hodell
 24 experienced problems with the Business One
 25 implementation only with respect to large

1 orders?

2 A. Number one, Hodell experienced
 3 problems not just with Business One. I don't
 4 know that Hodell ever used Business One without
 5 the LSi add-ons to perform its -- any actual
 6 business function.

7 There were limited tests of --
 8 of the software with the IFE extensions
 9 disabled that indicated adequate performance.
 10 But it was never -- there was never any
 11 production use, to my knowledge, with IFE --
 12 with the IFE extensions disabled.

13 So -- and to my knowledge, there
 14 was never any compre -- certainly Mr. Gumbel
 15 didn't cite and I haven't seen any
 16 documentation of any comprehensive measurement
 17 of what performance, what responsiveness this
 18 amalgam of Business One and -- and In-Flight
 19 produced.

20 So I'm not testifying as to what
 21 it did or didn't do because there's no
 22 evidence. And certainly there's no evidence of
 23 what it did or didn't do in a production
 24 environment of just Business One.

25 Q. Okay. Can you turn to Page 25.

1 A. Certainly.
 2 Q. There's a discussion about
 3 two-tier architecture.
 4 A. Okay.
 5 Q. Do you know whether PeopleSoft
 6 is still running two-tier architecture on --
 7 for its system?
 8 A. I would be surprised if they
 9 didn't have some legacy clients that still ran
 10 it. But my understanding is, that's not their
 11 current offering.
 12 Q. They abandoned it, right?
 13 MR. STAR: Objection.
 14 A. Well, they -- just like -- just
 15 like SAP is adding Hanna, every software
 16 company -- PeopleSoft is now part of Oracle.
 17 It's not an independent company.
 18 Every company improves upgrades
 19 and migrates its -- its products. So that's
 20 a -- it's my understanding that any PeopleSoft
 21 customer who had the two-tier version had the
 22 opportunity to upgrade and migrate to the
 23 three-tier version as that became the standard
 24 product.
 25 BY MR. LAMBERT:

1 Q. What about the SAP R/2 product
 2 you cited?
 3 A. What about it?
 4 Q. Is that still in use?
 5 A. I believe, to the best of my
 6 knowledge, there still are some SAP clients
 7 that still use R/2, yes. But I --
 8 Q. Do you know if they're --
 9 A. But I haven't looked. And the
 10 last time I heard of that was a couple of years
 11 ago. But I would expect -- it wouldn't be
 12 unexpected if there were still R/2 -- R/2
 13 installations in place.
 14 Q. Is SAP R/2 a two-tier
 15 architecture?
 16 A. That's my understanding.
 17 Q. What's that understanding based
 18 on?
 19 A. Oh, I -- if I recall correctly,
 20 I saw that on the SAP website. That's my --
 21 that's my recollection of where I saw it.
 22 Q. Are there differences -- even
 23 within two-tier architecture, are there
 24 differences in the way that information is
 25 processed or can there be?

1 I guess that's a poor question.
 2 A. Yes.
 3 Q. Two-tier architecture isn't --
 4 A. Yeah, it is a poor question.
 5 Q. All two-tier architecture
 6 products are not the same; is that correct?
 7 MR. STAR: The court reporter
 8 missed that. Can you repeat it?
 9 MR. LAMBERT: Strike it.
 10 BY MR. LAMBERT:
 11 Q. Would you look at footnote 44.
 12 Can you explain what you meant
 13 by your statement there in footnote 44?
 14 A. Yes. What I meant there is that
 15 in Mr. Gumbel's report, he refers to the two
 16 tiers as being the -- the PC on the user's desk
 17 and the application server that supports the
 18 PCs on the users' desks.
 19 In some cases, some systems are
 20 architected with two tiers. But those are not
 21 the two tiers. They could be architected with
 22 what are called dumb terminals. On
 23 application -- which is -- a dumb terminal
 24 wouldn't be a tier. And by "dumb terminal," I
 25 mean a terminal that is not a computer in and

1 of itself, wouldn't be a tier.
 2 With a -- a central computer and
 3 a database server, that would also be a
 4 two-tier architecture, but not the same
 5 two-tier architecture that Mr. Gumbel
 6 describes.
 7 Q. Well, did Mr. Gumbel, in your
 8 opinion, accurately describe the Business One
 9 two-tier architecture or are you saying there
 10 could be different Business One two-tier
 11 architectures?
 12 A. To the best of my knowledge,
 13 Mr. Gumbel accurately described the Business
 14 One two-tier architecture.
 15 Q. You're saying there's other
 16 products that have two-tier architecture that
 17 aren't necessarily the same as Business One?
 18 A. That's correct. When you have a
 19 two-tier or a multi-tier product, not every
 20 vendor uses the same two or the same three or
 21 four tiers as every other vendor.
 22 Q. Can you turn to Page 27. I'm
 23 going to ask you a quick question about opinion
 24 four.
 25 There's a series of bullet

1 points, three bullet points. And above that,
 2 you make the statement, "Among those that are
 3 likely to have been applicable to the reason
 4 why SAP lowered the target size of prospective
 5 SAP Business One customers."

6 A. Yes.

7 Q. Do you see that statement?

8 Do you have any supportable
 9 basis for making -- or for these three bullet
 10 points or are you just rendering a -- taking a
 11 guess at it?

12 A. I'm not taking a guess. I don't
 13 do guesses.

14 I have footnoted the three
 15 bullet points as to the specific documents that
 16 I -- that support them, number one.

17 Number two, as a former marketer
 18 of computer systems and software products,
 19 I'm -- I have personal experience at
 20 market-based focus of the product rather than
 21 functionality-based focus of the product.

22 Q. You didn't cite any testimony or
 23 communication with anyone at SAP in support of
 24 those opinions?

25 MR. STAR: Objection to the

1 Q. There's a series of bullet
 2 points under opinion number five starting on
 3 Page 28, continuing through Page 29.

4 A. Yes.

5 Q. I'm going to ask you a couple
 6 questions about -- about a couple of those.

7 The second bullet point on
 8 Page 28, what's a fit/gap analysis and why is
 9 that relevant to your opinion in number --
 10 opinion number five?

11 A. Fit/gap analysis is a commonly
 12 done analysis after -- after generally a
 13 contract signing, although sometimes it's done
 14 beforehand, to identify all of the areas where
 15 a -- an individual software product fits the
 16 specified needs of a potential user and all
 17 those areas which -- where there are gaps where
 18 either workarounds or modifications might be
 19 required.

20 Q. Why is your opinion that there
 21 was not a fit/gap analysis performed relevant
 22 to whether the Business One and In-Flight
 23 solution implementation was successful?

24 A. Well, when a fit -- fit/gap
 25 analysis is performed, there is customarily a

1 form. Mischaracterizes the report.

2 BY MR. LAMBERT:

3 Q. Is that accurate?

4 MR. STAR: You should read the
 5 whole report, the whole section.

6 A. Yes, there are other -- there is
 7 ample testimony that I've cited, I believe,
 8 leading up to these points and that I've cited
 9 in -- I believe in the industry background.

10 And there's testimony by several
 11 of the individuals that were deposed that are
 12 in support of -- of these points, in addition
 13 to the -- the specific documents.

14 If you read the whole support
 15 for that opinion, I cite at least exemplary
 16 testimony of -- of that nature.

17 BY MR. LAMBERT:

18 Q. Is that Mr. Ziv and Mr. Neveux
 19 that you're speaking of?

20 A. Yes. And I believe there's
 21 other testimony as well.

22 Q. Have you actually personally
 23 spoken with anyone at SAP about any of those --
 24 those three opinions on Page 27?

25 A. Not that I recall.

1 fit/gap report. No such report was produced in
 2 this case.

3 Q. You make the statement at the
 4 end of opinion number five on Page 30, "Hodell
 5 cannot escape responsibility for its decision
 6 to license the SAP Business One software in
 7 2005, while it still had the opportunity to
 8 delay licensing or reverse the decision to go
 9 with the proposed system altogether."

10 Do you see that statement?

11 A. Yes.

12 Q. What is that based upon?

13 A. Hodell faced a decision point in
 14 December of 2005. It was under -- it may have
 15 felt that -- that -- whatever it felt. But the
 16 signing of the SAP license agreement was a
 17 discrete act. It's one that Mr. Wright will
 18 testify that he had serious concerns about,
 19 which he did nothing to investigate or
 20 alleviate -- nothing substantive to investigate
 21 or alleviate.

22 And when a businessperson makes
 23 a decision with less than full information that
 24 was readily available, it seems to me, as a
 25 businessperson, it's hard to escape

1 responsibility for having done so.

2 Q. There's a statement at the top
3 of Page 30, "LSi was an experienced implementer
4 of business applications software."

5 Do you see that statement?

6 A. Yes.

7 Q. Do you know how many
8 implementations of Business One LSi had done
9 prior to Hodell?

10 A. I -- if my recollection is
11 correct, Hodell was one of its first, if not
12 its first.

13 Q. Is it your testimony that it was
14 Hodell's obligation to test the Business One
15 software prior to going live?

16 A. To test? Well, it was its
17 obligation not to go live until it was
18 satisfied that it had done everything that it
19 could to confirm that the system -- not just
20 Business One, but the system, including
21 Business One and the extensions -- performed
22 adequately.

23 Yes, it's always the user's
24 responsibility to -- to determine that the
25 system is acceptable to go live before it does.

1 In this case, Hodell went live
2 despite the rec -- Hodell had only one
3 individual on staff, to my knowledge, that had
4 any level of technical competence, and that
5 individual apparently felt that the software
6 was not ready to go live and recommended to
7 Hodell management that it not go live.

8 And so it certainly -- Hodell's
9 decision to overrule the recommendation of its
10 only employee, its only knowledgeable employee,
11 is certainly its own responsibility.

12 Q. Is that employee you're
13 referring to, Terry Phillips?

14 A. Yes.

15 Q. You think that he was Hodell's
16 what, IT project manager?

17 A. I believe he was the --

18 Q. Is that your -- what your
19 testimony is based on?

20 A. I believe he was the only -- he
21 was the most technically knowledgeable employee
22 of Hodell.

23 Q. What about people that weren't
24 employees of Hodell? What about LSi? What if
25 it was LSi's -- SAP's business partner's

1 recommendation to go live, is it your testimony
2 Hodell should not be allowed to rely upon that
3 advice?

4 MR. STAR: Objection to form.
5 You can answer.

6 A. Businesses can rely on
7 whatever they choose to rely on.

8 What I'm saying is, if they --
9 they can't escape responsibility for making a
10 decision that was recommended by someone
11 outside the business, when it was their
12 decision to make.

13 When they make a decision, that
14 recommendation is their decision. It's not --
15 LSi had no power to make that decision. That
16 was entirely under Hodell's control. It can't
17 then blame someone else for a decision that was
18 entirely its own decision. That's just common
19 business sense.

20 BY MR. LAMBERT:

21 Q. Okay. You make a statement that
22 Hodell didn't comply with LSi's testing
23 recommendations on Page 33.

24 A. Yes.

25 Q. Is that -- is your basis for

1 making that statement solely the deposition
2 testimony of Marcia Weissman?

3 A. Yeah. I did note that there was
4 contradictory testimony from Mr. Phillips.

5 But -- so it appeared to me that
6 Ms. Weissman's testimony was more reliable than
7 Mr. Phillips' in that regard. But I did note
8 that there was contradictory testimony.

9 And even if -- if Mr. Phillips'
10 testimony was -- was the one that was, in fact,
11 the more reliable, Mr. Phillips said that --
12 that even having done that testing, that the
13 test results were inadequate. And to go live
14 with failed test results would indicate that
15 the testing was not complete or not adequate.

16 So even if you believe Mr. -- if
17 one were to put more credence in Mr. Phillips'
18 testimony that what he thought was adequate was
19 done, my judgment is, since the result was
20 unsatisfactory, the testing that he felt was
21 adequate was, per se, not adequate. And his
22 own recommendation that Hodell not go live
23 is -- is evidence of that.

24 Q. Okay. Can you turn to Page 34.
25 This is opinion number seven where we're

Page 158	Page 160
<p>1 talking about some of the inadequacies in 2 Hodell's hardware network?</p> <p>3 A. Yes.</p> <p>4 Q. I want to talk about the second 5 bullet point. "Hodell's network was configured 6 with a single server with a single drive, 7 instead of splitting the configuration up to 8 share the load among multiple servers."</p> <p>9 A. Yes.</p> <p>10 Q. What do you mean by that?</p> <p>11 A. I -- I'd have to go back and 12 I -- I referenced Mr. Guagenti's deposition, 13 Pages 25 and 26. And I'd have to review what 14 he said in order to answer that. I don't 15 recall specifically what he said.</p> <p>16 Q. What do you mean by, "splitting 17 the load up among multiple servers"? Is that 18 your language or is that Mr. Guagenti's?</p> <p>19 A. I can't answer that question 20 without -- if -- if -- if we have that 21 deposition here, I'd be happy to look at 22 specifically what I referenced and give you an 23 answer. But without looking at what I 24 referenced in the deposition, I -- I can't give 25 you an answer.</p>	<p>1 the record at 13:29. Beginning of tape 2 number four.</p> <p>3 BY MR. LAMBERT:</p> <p>4 Q. Under opinion number seven, are 5 there any other inadequacies or deficiencies in 6 Hodell's network or hardware that you can 7 identify that would have contributed to its 8 performance issues other than those listed 9 under opinion seven?</p> <p>10 A. I don't believe I -- I don't 11 believe there were others.</p> <p>12 Q. Under opinion eight, you make 13 the comment that Hodell was no longer providing 14 top-down commitment?</p> <p>15 A. I don't recall where I said 16 that, but that I do believe, to some extent, 17 that's true, yes.</p> <p>18 Q. What do you mean by that?</p> <p>19 A. There was an indication early in 20 the process that Hodell had already told LSI 21 and/or some of its employees that it was 22 considering litigation, and looking for a -- 23 which indicates to me less than a full top-down 24 commitment.</p> <p>25 Q. Okay. So it's your basis that</p>
<p>Page 159</p> <p>1 Q. Well, I'm trying to get, is that 2 your opinion? Is that bullet point your 3 opinion, that networks should have been split 4 up among multiple servers to share the load? 5 Is that one of your expert opinions in this 6 case?</p> <p>7 A. I say what I say. I stand 8 behind what I say. I can't explain it any 9 further without looking.</p> <p>10 If you'd like to show me the 11 deposition where I -- what I referenced there, 12 I could give you more explanation than I put 13 here. I can't do it from memory.</p> <p>14 Q. Okay.</p> <p>15 MR. LAMBERT: Greg, do you want 16 to take a minute? I think I might be 17 done.</p> <p>18 MR. STAR: Okay.</p> <p>19 THE VIDEO TECHNICIAN: Going off 20 the record at 13:24.</p> <p>21 ---</p> <p>22 (Whereupon, a recess was taken 23 from 1:24 p.m. to 1:29 p.m.)</p> <p>24 ---</p> <p>25 THE VIDEO TECHNICIAN: Back on</p>	<p>Page 161</p> <p>1 because -- because Hodell had consulted with 2 legal counsel, they were no longer providing 3 commitment to the success of this 4 implementation? Is that the basis for that 5 statement?</p> <p>6 A. If -- I don't recall the 7 specific documents and/or testimony that I 8 looked at at the time. But it was in that 9 context, there was some discussion of the -- 10 the level of commitment.</p> <p>11 It wasn't just the fact of -- of 12 considering litigation, but that if -- if we 13 were to look at all the -- the specific 14 documents and/or -- and testimony I cited and 15 look in the context there, there was an 16 indication that there was less than full 17 top-down commitment.</p> <p>18 Q. Can you turn to Page 38. I want 19 to ask you a couple questions about your prior 20 testimony.</p> <p>21 A. Sure.</p> <p>22 Q. In each of these cases cited, 23 was it a dispute between a software customer 24 and a software vendor?</p> <p>25 A. No.</p>

1 Q. Which ones were not?
 2 A. Pardon me?
 3 Q. Which ones were not a
 4 customer/vendor dispute?
 5 A. The Oracle USA v. Rimini Street
 6 is -- they're two vendors.
 7 The --
 8 Q. Who did you testify on behalf of
 9 in that case?
 10 A. Pardon me?
 11 Q. Who were you representing or
 12 testifying in favor of in that case?
 13 A. I'm engaged by the law firm for
 14 Rimini Street.
 15 Q. Okay.
 16 A. The ePlus v. Lawson, it was a
 17 patent dispute between two vendors. I was
 18 engaged by counsel for ePlus, the plaintiff.
 19 That's -- the others are
 20 disputes between vendors and their customers.
 21 Q. Okay. For each of the remaining
 22 cases where there were -- it was a
 23 vendor/customer dispute, can you tell me for
 24 each one whether you were on the side of the
 25 vendor or the customer?

1 A. Certainly. The PC Onsite versus
 2 Massage EN V, I was on the side of the
 3 customer.
 4 The Prodomax versus Encompix, I
 5 was on the side of the customer, Prodomax.
 6 In the Massage EN V case,
 7 Massage EN V was the -- was the -- well, the
 8 Massage EN, but their trade name is
 9 Massage EN V.
 10 Prodomax was the customer and I
 11 was engaged by their law firm.
 12 In the DCS and FDCS cases, I was
 13 engaged by three different law firms, all
 14 representing different dealerships or groups of
 15 dealerships. And DCS, or also known as FDCS,
 16 was the vendor.
 17 The Axway versus DHL Express, I
 18 was on the side of DHL Express, which was the
 19 customer.
 20 AOL versus Accenture, I was
 21 engaged by counsel for AOL, which was the
 22 customer.
 23 And Summit Electric versus IBM,
 24 I was engaged by counsel for Summit Electric,
 25 which was the customer.

1 Q. My last question is, hopefully,
 2 at the bottom of Page 37, your conclusion for
 3 your last opinion eight, you state that
 4 ultimately -- you make the conclusion that,
 5 ultimately, significant performance
 6 improvements were achieved.
 7 Do you see that?
 8 A. Yes.
 9 Q. And you cite to a -- an SAP
 10 document?
 11 A. Yes.
 12 Q. Is there anything else you're
 13 basing that conclusion upon?
 14 A. You know, I'd have to look at
 15 that document to -- to let you know whether
 16 I -- well, I say, for example, e.g., that
 17 document. I believe there were other documents
 18 that said essentially the same thing.
 19 Q. Can you recall any of them right
 20 now?
 21 A. Not off the top of my head, no.
 22 MR. LAMBERT: Okay. All right.
 23 Thank you, sir.
 24 THE WITNESS: You're welcome.
 25 MR. HULME: I can move the

1 camera, but --
 2 MR. STAR: We can see you, Roy.
 3 MR. HULME: You can see me?
 4 MR. STAR: We have the distinct
 5 pleasure --
 6 MR. HULME: All right.
 7 MR. STAR: -- yes.
 8
 9 EXAMINATION
 10
 11 BY MR. HULME:
 12 Q. Let me start by asking you,
 13 would you agree that collaboration between a
 14 manufacturer and a manufacturer's
 15 representative or the reseller is something
 16 that a manufacturer should promote?
 17 A. In -- in -- in general, I think
 18 it's good that -- that -- by "manufacturer," I
 19 think you mean a software developer?
 20 Q. Yes.
 21 A. Yeah, in general, I think it's
 22 good that -- that software developers promote
 23 communication between themselves and their
 24 implementers, business partner implementers.
 25 Q. If you want a good working

1 relationship, that's an important thing that
 2 the software developer should be doing,
 3 correct?

4 A. I -- I don't --

5 MR. STAR: Objection to form.

6 A. (Continuing) I don't advise
 7 business partners or software developers. I
 8 think it's a good thing to do. I think it
 9 works to everyone's benefit.

10 BY MR. HULME:

11 Q. It works to the customer's
 12 benefit if the partner of the software
 13 developer is kept up-to-date as to what the
 14 program can and cannot do, correct?

15 A. Yes.

16 Q. It works to the benefit of both
 17 the manufacturer, the representative and the
 18 customer?

19 A. The developer, the implementer
 20 and the customer, yes.

21 Q. Now, what's your understanding
 22 of the target market for Business One in 2004
 23 and 2005?

24 A. It was what was referred to as
 25 the SMB market, small-medium-sized business.

1 Q. And the small- to medium-sized
 2 business, you defined that.

3 A. Well, SAP is a European
 4 country -- company. And there's actually a
 5 European economic community definition of what
 6 an SMB is.

7 And I think that that definition
 8 coincides with -- with -- with the target
 9 market for this product not only in Europe, but
 10 also in the U.S.

11 Q. Can we agree that Hodell fits
 12 squarely within the target market as you just
 13 defined?

14 A. That's my understanding, yes.

15 Q. Okay. So based upon your
 16 understanding of what SAP's target market was,
 17 can we agree that SAP fits squarely within the
 18 market that SAP was marketing as Business One
 19 to?

20 MR. STAR: I think you
 21 misstated, Roy. I think you said SAP
 22 instead of Hodell.

23 MR. HULME: Okay. Let's start
 24 again.

25 MR. STAR: Yes.

1 BY MR. HULME:

2 Q. Can we agree that Hodell fits
 3 squarely within the market to which SAP was
 4 targeting Business One?

5 MR. STAR: Objection to form.

6 A. Certainly in terms of annual
 7 revenue and number of employees, they -- they
 8 fit in -- in the target market, yes.

9 BY MR. HULME:

10 Q. And those are the only two
 11 criteria used to define the small- to mid-sized
 12 businesses, as far as you know?

13 A. I think I put it in here.

14 According to the EC, the size range for SMEs,
 15 small- and medium-sized enterprises, is from
 16 ten to 250 employees and from two million Euros
 17 to 50 million Euros, which would be
 18 two-and-a-half million to 65 or \$75 million in
 19 annual revenues, depending on the exchange
 20 rate.

21 And -- and it's my understanding
 22 that Hodell did fit into that -- into that
 23 range.

24 Q. Do you agree that there were
 25 inherent limitations in Business One in 2006

1 that made it inappropriate for Hodell?

2 A. No.

3 Q. And why not?

4 A. I've seen no evidence that there
 5 was. And I've seen -- and there has been
 6 evidence produced in this case that other
 7 businesses of comparable size and complexity to
 8 Hodell were successfully using Business One.

9 Now, if you mean by "inherent
 10 limitations," did it meet every single one of
 11 hotel -- Hodell's requirements, certainly we --
 12 we know that it -- that at least in the
 13 perception of LSi and in the perception of
 14 Hodell, it required these IFE add-on
 15 modifications to be made in order to meet -- to
 16 be made successfully in order to meet Hodell's
 17 needs.

18 But if your question is was it
 19 suitable for a company the size and complexity
 20 that hotel -- Hodell is, the answer is yes.

21 If your question is, did it meet
 22 of all of Hodell's known needs, the answer is,
 23 apparently, no.

24 Q. Have you seen the opinion of Udi
 25 Ziv, for example, who expressed an opinion that

1 a company the size of Hodell was an
 2 inappropriate company to use Business One at?
 3 MR. STAR: Objection to form.

4 BY MR. HULME:

5 Q. Have you seen that?

6 MR. STAR: Objection to form.

7 He should see the document. Do
 8 you have it? Do you want to refer him to
 9 a document?

10 BY MR. HULME:

11 Q. I'm just asking, have you seen a
 12 document from Udi Ziv where he expressed
 13 opinion that no sane person would sell Business
 14 One to a company the size of Hodell?

15 MR. STAR: Objection to form.

16 A. I saw -- I can't, from memory,
 17 attest to the exact wording, Mr. Ziv's exact
 18 wording.

19 I -- I recall that there was an
 20 off-the-cuff e-mail that expressed something of
 21 that nature that Mr. Ziv later made statements
 22 that were contrary to that.

23 I also know that the product was
 24 outside the -- the target market, as I've
 25 discussed, or the sweet spot, the marketing

1 necessarily that it would be accurate to
 2 characterize him as part of, quote, the
 3 development group.

4 BY MR. HULME:

5 Q. Well, do you understand that he
 6 was head of the development group, reporting
 7 only to the board of directors? Do you
 8 understand that or not?

9 A. It was my --

10 Q. Do you understand that or not?
 11 A. Pardon me? I didn't mean to
 12 interrupt. Could you repeat the last part of
 13 your question?

14 Q. Okay. I just wanted to know if
 15 you -- if that was your understanding.

16 A. It was my understanding that he
 17 headed up the Israeli division or the -- the
 18 portion of SAP that had responsibility for the
 19 Israeli division where Business One was
 20 originally developed.

21 To characterize him as head of
 22 the development group, I think, is an
 23 inaccurate characterization.

24 Q. Okay. But you do recall that he
 25 made statements clearly indicating his opinion

1 objective for Business One.

2 And it wasn't clear, to the best
 3 of my recollection, from the e-mail that -- and
 4 I'd have to see it -- that you referred to
 5 whether he was talking about Business One
 6 itself or whether he was talking about the
 7 marketing -- target market for Business One.

8 BY MR. HULME:

9 Q. Do you understand that Mr. Ziv
 10 is in the development group?

11 MR. STAR: Objection to form.

12 A. I understand that Mr. Ziv was
 13 based in Israel, where the software was
 14 developed. He was not originally with the same
 15 company that developed the software, although
 16 both his company and the company that
 17 originally developed the software were both
 18 acquired by SAP.

19 In terms of being in the
 20 development group, it wasn't clear to me
 21 whether his responsibilities were primarily --
 22 primarily development or primarily management,
 23 but I think the latter.

24 So it is my understanding that
 25 he was in the Israeli part of SAP, but not

1 that Business One was inappropriate for a
 2 company of Hodell's size, correct?

3 MR. STAR: Objection to form.

4 A. I don't think that's an
 5 accurate -- to my recollection, I don't believe
 6 that's an accurate characterization of what his
 7 e-mails indicated.

8 I think they indicated an
 9 initial reaction, not a fully formed opinion.
 10 So to characterize it as his opinion doesn't
 11 seem accurate to me.

12 And it was also -- doesn't seem
 13 accurate to me to -- to imply from that, that
 14 that was a development or a functionality or a
 15 capability perspective rather than a marketing
 16 perspective.

17 BY MR. HULME:

18 Q. Okay. And where does marketing
 19 differ from development when it relates to
 20 representing whether a program is appropriate
 21 for a particular customer?

22 MR. STAR: Objection to form.

23 A. Companies also -- often have
 24 overlapping product lines. And they make
 25 arbitrary decisions for marketing purposes

1 about how these products with overlapping
 2 capabilities, to whom they should be marketed,
 3 that have, in some cases, little or nothing --
 4 not in all cases, but certainly in some cases,
 5 little or nothing to do specifically with the
 6 functionality, capability or capacity of the
 7 products.

8 BY MR. HULME:

9 Q. So -- but you would agree with
 10 me that from Mr. Ziv's perspective, whatever
 11 he -- whatever his role was within the company,
 12 his initial impression was that this was an
 13 inappropriate application of Business One,
 14 correct?

15 MR. STAR: Objection to form.

16 A. His --

17 BY MR. HULME:

18 Q. That was his original statement.

19 A. His --

20 MR. STAR: Objection to form.

21 Assume facts not in evidence.

22 A. (Continuing) His e-mail says
 23 what it says. Let's look at the e-mail. And I
 24 think the e-mail speaks for itself.

25 But it has to be taken in the

1 reflected in his initial e-mail.

2 Q. His initial e-mail suggested
 3 that the money be refunded to the customer,
 4 correct?

5 MR. STAR: Objection to form.

6 A. I -- I -- I don't recall the
 7 wording. It says what it says. I don't
 8 dispute that it says what it says.

9 BY MR. HULME:

10 Q. And do you recall that his
 11 solution initially was to refund the customer's
 12 money?

13 MR. STAR: Objection to form.

14 BY MR. HULME:

15 Q. Do you have that recollection?

16 A. I don't recall one way or the
 17 other.

18 Q. Okay. If that was his initial
 19 solution, would you agree with me that more
 20 likely than not, he was looking at this from a
 21 functional standpoint, a development
 22 standpoint, not a marketing standpoint?

23 MR. STAR: Objection to form.

24 It calls for speculation.

25 THE WITNESS: Should I answer?

1 context of what his more refined or seasoned
 2 statements were once he had investigated things
 3 further.

4 BY MR. HULME:

5 Q. You mean the statement -- his
 6 follow up e-mail to Dan Lowery, the
 7 contradictory e-mail. Is that what you're
 8 referring to?

9 MR. STAR: Objection to form.

10 A. Show me the e-mail.

11 BY MR. HULME:

12 Q. Okay. You said that you had a
 13 recollection that he made some contradictory
 14 statements after he made his original
 15 off-the-cuff remark. You testified to that.

16 Do you have a recollection of
 17 what communications you were referring to?

18 A. To the best of my recollection,
 19 he had some involvement and there was e-mail
 20 traffic involving him following that initial
 21 reaction he had.

22 My recollection, he was also
 23 deposed and made statements in his deposition
 24 that reflect a more thorough analysis of -- of
 25 what the situation actually was than would be

1 MR. STAR: I can't instruct you
 2 not to answer because it doesn't call for
 3 privileged information. But if you feel
 4 that you're qualified to render an
 5 opinion as to what was --

6 MR. HULME: That's all you have
 7 to say, Greg.

8 MR. STAR: -- called for, then
 9 go ahead.

10 MR. HULME: Greg.

11 A. I -- I -- repeat the question,
 12 please. Or maybe could I have the court
 13 reporter read back the question?

14 MR. HULME: Sure.

15 ---

16 (Whereupon, the court reporter
 17 read back the following:

18 "QUESTION: If that was his
 19 initial solution, would you agree with me
 20 that more likely than not, he was looking
 21 at this from a functional standpoint, a
 22 development standpoint, not a marketing
 23 standpoint?"

24 ---

25 A. (Continuing) No.

1 BY MR. HULME:

2 Q. And why not?

3 A. There's no evidence to indicate
4 that. And it was a -- I don't believe
5 necessarily that his deposition testimony
6 supported that.

7 Q. What occurred -- do you know of
8 anything that occurred between the time he
9 wrote his initial e-mail in 2007 and his
10 deposition in 2012?

11 Do you have any knowledge of
12 what occurred in that interim that may have
13 changed his mind?

14 MR. STAR: Objection to form.

15 A. I have some recollection, yes,
16 that --

17 BY MR. HULME:

18 Q. What is it?

19 A. That --

20 Q. What is that recollection?

21 MR. STAR: He is about to say.

22 A. My recollection is that changes
23 were made to the way the -- the Business One
24 software works. Changes were made to the way
25 the IFE software works. Changes were made to

1 clear to me that that reaction was known well
2 enough that it was an accurate enough reaction
3 to inform LSi until everything that could be
4 done to improve performance had been done to
5 improve performance. And that clearly wasn't
6 the case until later.

7 BY MR. HULME:

8 Q. So if the technical people at
9 SAP were of the opinion that Hodell was an
10 inappropriate application and that Business One
11 would not work for a customer of the size of
12 Hodell, you would condone not telling either
13 the customer or LSi of those then-existing
14 opinions --

15 MR. STAR: Objection.

16 BY MR. HULME:

17 Q. -- is that correct?

18 MR. STAR: Objection to form.

19 A. I would condone not telling them
20 until everything that could be done was done.

21 And if that -- if that
22 opinion -- if they were of that opinion at a
23 point when they were still actively engaged in
24 making improvements and adjustments that had
25 the potential of ameliorating the problem, then

1 the Hodell infrastructure that considerably
2 improved the performance of the combination
3 system such that even if that -- his initial
4 reaction had been, which I don't necessarily
5 agree it was, but even if it had been from a
6 technical standpoint, once the adjustments and
7 fixes and improvements and -- were made, both
8 on -- well, all three on Hodell's part to the
9 infrastructure, on LSi's part to the IFE, and
10 on SAP's part to the base software, that even
11 if that were his reaction, it was no longer an
12 accurate reaction.

13 BY MR. HULME:

14 Q. Can we agree that if the
15 development side, the technical side, of SAP
16 was of the opinion, in 2007, that Business One
17 would never work for a company with the
18 characteristics of Hodell, that LSi should have
19 been told?

20 MR. STAR: Objection to form.

21 A. The -- the hypothetical is such
22 that I don't know that I can give -- give an
23 answer in that it's not clear to me that the --
24 that that was ever the case.

25 But even if it were, it wasn't

1 I think it would be responsible to withhold
2 telling LSi and withhold telling the customer
3 until everything that could be done was done
4 and there was a final determination of that
5 nature.

6 BY MR. HULME:

7 Q. And how much time, in your
8 expert opinion, should be given for that --
9 those attempts to be made?

10 A. Certainly on the order of months
11 would be reasonable.

12 Q. "Months" meaning two or three or
13 "months" meaning ten, 12 or 24?

14 A. "Months" meaning at least two or
15 three and possibly six, eight or ten.

16 Q. Okay. As long as there was
17 progress being made?

18 A. Yes.

19 Q. Have you done any evaluation or
20 what have you done to evaluate whether any of
21 Hodell's performance complaints are objectively
22 valid or reasonable?

23 A. Performance complaints about --
24 well, to the best of my knowledge, there were
25 no performance complaints specifically about

1 SAP without the In-Flight extensions.
 2 I have taken at face value
 3 Hodell's complaints about the performance of
 4 the system, including the IFE and Radio Beacon
 5 extension.
 6 I haven't attempted -- I've
 7 assumed that Hodell's complaints that the
 8 performance didn't meet its requirements for
 9 the combination is accurate.
 10 I haven't done anything to -- to
 11 verify or to try to dispute the accuracy of --
 12 of that complaint.
 13 I haven't seen any complaints
 14 about the performance of the SAP Business One
 15 software without the IFE and Radio Beacon
 16 extensions.
 17 Q. Have you done anything to form
 18 an opinion as to the cause of the perceived
 19 performance issues or the issues perceived to
 20 be performance issues by Hodell?
 21 A. I have looked at what evidence
 22 there is of the cause and I have seen
 23 conflicting statements of the cause. I've also
 24 seen an understanding at some point that the --
 25 at least in some users' and some LSi

1 personnel's viewpoint, that the performance
 2 problems were resolved.
 3 But I haven't seen enough
 4 evidence to determine specifically -- to lay
 5 the specific blame for what Hodell considered
 6 to be performance problems unequivocally on one
 7 thing or another, but I don't think you can
 8 separate those performance problems out between
 9 the LSi extensions and the Business One
 10 software because they were never tested
 11 independently.
 12 Q. And I might have -- this might
 13 have been an unfair question.
 14 But do you hold yourself out as
 15 qualified to reach a conclusion as to the cause
 16 of the perceived performance problems?
 17 MR. STAR: Do you mean in
 18 general in a case or on this particular
 19 one?
 20 MR. HULME: Yes.
 21 MR. STAR: Which?
 22 BY MR. HULME:
 23 Q. I'm just trying to evaluate your
 24 role or your perceived expertise.
 25 A. In general, you're asking, not

1 specifically here?
 2 Q. Yes.
 3 A. Yeah, I --
 4 Q. I mean, it ultimately relates to
 5 this case. I mean, the ultimate issue in this
 6 was is what was the cause of the perceived
 7 performance problems.
 8 Do you believe you have the
 9 expertise to express an opinion on that issue?
 10 A. I don't know that I agree with
 11 your characterization that that's the ultimate
 12 issue.
 13 But I can tell you that I have
 14 been qualified in federal court on -- to make
 15 determinations of that nature in other cases.
 16 Q. All right. What nature?
 17 A. Whether software was or was not
 18 capable of -- of meeting particular criteria
 19 and what -- and if it wasn't, what was the
 20 cause.
 21 I don't think there's enough
 22 evidence here for me to do that in this case.
 23 But I have done that and have been qualified to
 24 do that in other cases.
 25 Does that answer your question?

1 Q. Yeah, I believe so. Well
 2 enough. Thank you.
 3 A. Thank you.
 4 MR. STAR: Off the record.
 5 We're a couple minutes --
 6 THE VIDEO TECHNICIAN: Going off
 7 the record at 14:02.
 8 - - -
 9 (Whereupon, a discussion was
 10 held off the record.)
 11 - - -
 12 (Whereupon, a luncheon recess
 13 was taken at 2:02 p.m.)
 14 - - -
 15 (Whereupon, the deposition
 16 resumed at 2:57 p.m.)
 17 - - -
 18 THE VIDEO TECHNICIAN: Back on
 19 the record at 14:57.
 20 MR. HULME: Are you guys there?
 21 THE VIDEO TECHNICIAN: We're
 22 ready. Back on the record.
 23 MR. STAR: Sorry. It was muted.
 24 Go ahead.
 25 THE VIDEO TECHNICIAN: I'm

1 sorry. We're back on the record,
2 Counsel.

3 MR. HULME: Okay. Are we all
4 set?

5 THE VIDEO TECHNICIAN: Yes, sir.
6 MR. HULME: Okay.

7 BY MR. HULME:

8 Q. Your opinion number five, which
9 is summarized at Page 4 of your report.

10 A. Yes.

11 Q. You mention, and you state
12 that -- you use the phrase, "without getting
13 normal guidance from SAP."

14 What do you mean by "normal
15 guidance"?

16 A. That refers to the period
17 between December 2004 and December 2005 in
18 particular, and in -- even to some extent after
19 the SAP license agreement was signed, when LSi
20 was beginning to have difficulties developing
21 the add-on and Hodell, I guess, was aware of
22 the -- of some of the problems LSi was
23 encountering, both parties knew, in fact, that
24 it was their expectation that Hodell would sign
25 an LSi license in December of 2005.

1 When issues started to come up,
2 there is no reason why LSi should not have
3 started to raise questions and get the kind of
4 support from SAP to make sure that the IFE
5 extension was being properly developed and
6 efficiently developed, that they didn't
7 actually start to get until pretty much almost
8 until after go-live.

9 And there was ample setbacks
10 from the beginning of the development of the
11 IFE extension up until go-live, where it would
12 have been appropriate for LSi to have
13 highlighted issues it was having and enlisted
14 SAP's assistance in determining whether --
15 whether there was anything about the way they
16 were programming it or anything about the
17 interface that -- that SAP could have helped
18 with, but they didn't do it.

19 Q. So it's your understanding that
20 up until go-live, LSi did not have any
21 communication with SAP about this project?

22 A. If I communicated it that way,
23 that's not entirely true.

24 There wasn't extensive
25 communication back and forth until go-live.

1 And there wasn't even substantive communication
2 or, as I recall, any technical communication at
3 all until a couple months after the SAP license
4 agreement was -- was signed.

5 And -- but from that initial
6 contact during 2005 up until go-live, even then
7 the amount of support that LSi called upon SAP
8 to provide and -- and the number of issues that
9 they raised was -- was extremely -- far more
10 limited than it should have been, given the --
11 the evident problems that -- that it was
12 encountering to the point where at the point of
13 pre-go-live testing, the testing was either
14 practically -- extremely limited or
15 unsuccessful.

16 Q. Well, let me get back to the
17 phrase, "normal guidance."

18 Where do I look at to determine
19 what normal guidance is?

20 A. Let me see if I can define what
21 I meant by normal guidance.

22 LS --

23 Q. First of all, is it a standard
24 some -- is it written down someplace? Is there
25 a standard? Is there a rule book, a procedure

1 manual that sets up what normal guidance is?

2 A. There are -- you know, I
3 haven't -- I didn't mean to refer to some
4 written standard. Although I expect that there
5 are some standards in the business partner
6 relationship, either in the contract or in
7 the -- the guidance that SAP gives to its
8 business partners as to what the normal
9 guidance said it would provide to -- to
10 developers of add-on products would be.

11 But basically that's what I
12 meant.

13 Since LSi was developing add-on
14 software for Business One, what I meant with
15 normal guidance was a back and forth
16 conferring, much like what was done after
17 go-live, to identify potential problems and
18 resolve potential problems and adjust the --
19 the way that the add-on software was being
20 developed to avoid potential problems.

21 Q. But then are you presuming that
22 it was the add-on software that was causing the
23 problems?

24 A. Well, I think I've tried to
25 answer that before in that there was no

1 comprehensive testing that -- to determine
 2 whether -- where the problem lies.

3 The indications were, when there
 4 was cursory testing of Business One without the
 5 In-Flight extensions, that the performance was
 6 good to satisfactory. And that when you added
 7 on the -- the IFE, that that's when the
 8 problems occurred.

9 But as I mentioned when your --
 10 your compatriot was examining me, that there
 11 really wasn't enough data at any point to -- to
 12 make that determination.

13 All we know is that the
 14 performance was signi -- very significantly
 15 better in limited observation without IFE and
 16 very much significantly worse with IFE.

17 Q. So that when you used the
 18 phrase, "normal guidance from SAP," in your
 19 opinion number five, what you're meaning is
 20 that what SAP would normally choose to give its
 21 partner?

22 A. That's correct, the normal type
 23 of -- of troubleshooting and development
 24 support.

25 By the time go-live happened,

1 that opinion?

2 A. Those are not assumptions and
 3 presumptions. Those are facts.

4 Q. Based upon how you recall those
 5 facts?

6 A. Well, I've actually cited to the
 7 documents and the testimony supporting those
 8 facts.

9 Q. And I think Wes has already
 10 covered, if you cited it, it's -- I mean, your
 11 basis is cited in your report?

12 A. Yes, sir.

13 Q. Opinions five and six both
 14 reference normal and customary actions. You
 15 accuse LSi and Hodell of not getting normal
 16 guidance from SAP and, quote, without taking
 17 normal and customary actions, close quote.

18 What -- where do I find what
 19 normal and customary actions are?

20 A. If you're quoting and close
 21 quoting me, are you talking about in the
 22 wording of the opinion itself or in the
 23 support, and which opinion?

24 Q. Opinion number five.

25 A. Okay.

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1 development support wasn't available anymore.
 2 But had LSi come to SAP sooner, they could have
 3 gotten not only troubleshooting and -- and
 4 issue fixing kinds of support, but they could
 5 have gotten guidance on ways to improve the way
 6 that the IFE was being developed to potentially
 7 avoid the kinds of -- of performance issues
 8 that ultimately showed out.

9 Q. But you keep coming back to
 10 development of the IFE. I'm trying to find out
 11 about what you base your conclusion that the
 12 development of the IFE was the problem. Or do
 13 you reach that conclusion?

14 A. I -- I -- I think I've tried to
 15 answer that as best I could by saying, in the
 16 limited observation of -- of the Business One
 17 without IFE, performance seemed to be
 18 satisfactory to -- to reasonably good.

19 When you added IFE on to it,
 20 which is how all of the production use was, the
 21 performance was no longer -- no longer met
 22 Hodell's desires and expectations.

23 So --

24 Q. And those are the assumptions
 25 and presumptions you're relying upon to express

1 Q. The summary of your statement of
 2 opinion.

3 A. Okay.

4 Q. And like I said, you accuse LSi
 5 and Hodell of taking certain actions, quote,
 6 without taking normal and customary actions to
 7 avoid potential problems.

8 A. Having --

9 Q. So I'm trying to find out --

10 A. Okay.

11 Q. -- where do I go to find what
 12 normal and customary actions are?

13 A. Having worked in this industry
 14 for 40 years, I've been qualified as an expert
 15 on the normal customs and practices of the
 16 industry. I don't know necessarily that there
 17 are learned treatises that -- that one could go
 18 to, but I've been a part of well over a hundred
 19 implementations of business software and I have
 20 testified at at least half that -- half that
 21 many in addition.

22 I've tried to explain to you
 23 what, in my experience, are the normal and
 24 customary actions that Hodell and LSi and SAP
 25 had reason to expect the other parties would

1 do.

2 And I can ex -- you know, I
 3 don't know, as I said, that I have a learned
 4 treatise that you can go to that will say that.
 5 That's based on my 40 years of experience in
 6 the industry.

7 Q. So what you're saying is, if I
 8 or LSi wanted to know what the normal and
 9 customary actions they should have taken were,
 10 then ask you?

11 A. Well, also --

12 MR. STAR: Objection to form.

13 A. (Continuing) No, I'm not saying
 14 that.

15 In addition to that -- number
 16 one, there are lots of experts that they could
 17 ask.

18 Number two, there are guidelines
 19 that SAP publishes and that its competitors
 20 publish as to what levels of support they give
 21 to business partners and that they give to
 22 customers under different circumstances.

23 So that in this case, if you're
 24 talking about the normal and customary support
 25 that SAP gives to its business partners, it has

1 business partners.

2 These things aren't secrets.

3 BY MR. HULME:

4 Q. Do you have an opinion as to
 5 whether SAP met its own standards in this case
 6 before go-live?

7 A. Without any specific
 8 recollection of what SAP's standards are, I
 9 can't -- I can't say that I do.

10 However, its actions prior to
 11 go-live, the period of time at which it had
 12 hardly any indication that issues were -- were
 13 arising, if any, it was not particularly called
 14 upon and consistent with the customs and
 15 practices of the industry to do any more than
 16 it did.

17 There was nothing -- no support
 18 that it failed to give, given what it knew
 19 prior to go-live, that are contrary to what
 20 would be normal customs and practices of the
 21 industry.

22 Q. Okay. So, again, you're saying
 23 that LSi and Hodell did not take normal and
 24 customary actions because, in your
 25 understanding, there was hardly any contact

1 a whole series of things that it publishes to
 2 business partners as to what they can expect.
 3 And that would be what would be relevant in
 4 this case.

5 What I'm commenting on here are
 6 the customs and practices of the industry, not
 7 speci -- which I expect are very congruent with
 8 whatever SAP's published levels are.

9 BY MR. HULME:

10 Q. So if I, as a lawyer in this
 11 case, wanted to know what the normal and
 12 customary actions that you contend my client
 13 should have done, I either ask you or I ask
 14 SAP?

15 MR. STAR: Objection to form.

16 A. You would -- well, you can
 17 ask --

18 MR. STAR: That has not been his
 19 testimony.

20 A. (Continuing) You can ask your
 21 own expert. You can -- there are lots of other
 22 experts out there.

23 You can go to the SAP website.
 24 You can get discovery on what the -- SAP's own
 25 standards are in dealing with its -- with its

1 between LSi and SAP before go-live; is that
 2 correct?

3 A. SAP could only act on -- on
 4 resolving issues if new issues existed. It
 5 didn't really have any significant knowledge of
 6 such issues.

7 Q. Okay. So, again, one of the
 8 bases of your opinion in this case is that SAP
 9 did not have any significant indication that
 10 LSi was having problems at the development
 11 stage; is that correct?

12 A. And not only SAP, but also
 13 the -- the project manager -- Ms. Weissman, the
 14 project manager for LSi, had -- had -- was
 15 unaware of very critical issues that it -- that
 16 LSi should have known about that Hodell
 17 didn't -- apparently didn't tell it.

18 And, certainly, Mr. Woodrum knew
 19 that there were problems with the project. But
 20 the scope of the issues that -- that would be
 21 uncovered after -- after go-live were never --
 22 never revealed even to LSi by -- by Hodell.

23 Q. A simple question.

24 A. Sure.

25 Q. All right? And I'd like a

1 simple answer, if you can give it to me.
 2 A. I'll do the best I can.
 3 Q. Can we agree -- can we agree
 4 that the premise of your opinion that LSi did
 5 not take normal and customary actions to avoid
 6 potential problems in the pre-go-live stage,
 7 the primary premise of that is that there was
 8 hardly any indication given by LSi to SAP that
 9 it was having problems during the development
 10 phase?

11 MR. STAR: Objection to form.
 12 BY MR. HULME:

13 Q. Yes or no?

14 A. I don't know that I would say
 15 that. I might say that was primary. I don't
 16 know necessarily that I would characterize that
 17 as primary. But that's certainly a major
 18 issue.

19 Q. Okay. What other issues then,
 20 besides that, do you base your opinion upon
 21 that they did not take normal and customary
 22 actions?

23 A. Let me take a look at the
 24 support for my opinion.

25 Q. Sure.

1 (Pause)
 2 A. Well, the fact that LSi didn't
 3 do the things that it -- it should have done
 4 during the development, such as preparing a --
 5 a formal fit/gap, such as getting Hodell
 6 approval of specifications.

7 Q. Before going -- before -- I'm
 8 trying to save -- excuse me. Before -- saving
 9 time -- are you just simply going to go down
 10 your list of bullet points?

11 A. Not necessarily all of them.

12 Q. Because I can read those.

13 A. Not necessarily all of them,
 14 but --

15 Q. But they're all included in this
 16 list? Can we say they're all included in this
 17 list?

18 A. Sure.

19 Q. Okay. All right. Go to the top
 20 of Page 29 then.

21 A. I'm there.

22 Q. Your very first bullet point.

23 A. Yes.

24 Q. "Hodell's (and possibly LSi's)
 25 withholding the fact from SAP that it expected

1 it would ultimately need to 'scale up' the
 2 Business One/In-Flight/Radio Beacon . . . to
 3 support three to four times as many users (in
 4 other words, 250 or more) as the 80 it had
 5 originally licensed."

6 Now, are you aware that
 7 Mr. Van Leeuwen has testified that he had a
 8 personal meeting with SAP where he explained to
 9 them that he was envisioning using SAP Business
 10 One product in a business and then described
 11 the characteristics of Hodell?

12 MR. STAR: Objection to the
 13 form. If you -- well, go ahead.

14 BY MR. HULME:

15 Q. Were you aware of that?
 16 A. I'm -- could you -- could you
 17 restate that? I'm not sure I caught all of
 18 it.

19 Q. Sure. Are you aware that
 20 Mr. Van Leeuwen has testified that he sat down
 21 with SAP and their representatives and
 22 explained to him that he had a business with
 23 certain characteristics and he wanted to know
 24 whether Business One could meet those and
 25 address those characteristics?

1 MR. STAR: Objection to form.
 2 It assumes facts that aren't in evidence
 3 and testimony that doesn't exist.

4 A. I don't remember the specific
 5 testimony or the -- the level of -- or any
 6 details of that testimony to the level of
 7 specificity that you've described.

8 BY MR. HULME:

9 Q. Are you assuming that nobody
 10 from LSi sat down with SAP and outlined their
 11 intended use of Business One at Hodell?

12 A. With the --

13 MR. STAR: Objection to form.
 14 Go ahead.

15 A. (Continuing) Are you
 16 specifically referring at this point to the
 17 scaling up to 250 or more users?

18 BY MR. HULME:

19 Q. Yes. One, scaling up to 250 or
 20 more users. And two, describing the
 21 transaction volume that was expected.

22 Are you assuming that
 23 conversation did not take place?

24 MR. STAR: Object to form.

25 A. I've seen no evidence that would

1 support that sort of communication from
 2 Mr. Van Leeuwen to SAP at the level of -- of
 3 detail that -- that you've described.

4 BY MR. HULME:

5 Q. Okay. So you're assuming it did
 6 not happen? For purposes of your opinions in
 7 this case, you're assuming it did not happen?

8 A. I'm -- I have no evidence that
 9 there was a discussion at that level of
 10 specificity that happened. And lacking any
 11 such evidence, I have to assume that -- that it
 12 didn't happen.

13 Q. Okay. What testing do you
 14 believe should be done on the Business
 15 One/In-Flight/Radio Beacon software solution
 16 before go-live?

17 A. Well, you have to have a
 18 satisfactory unit testing, satisfactory
 19 integration testing, and then you have to have
 20 a user acceptance test where -- including
 21 testing -- what's called stress testing of the
 22 volumes involved with a -- with acceptable
 23 results rather than unacceptable results.

24 And while there is dispute as to
 25 how much testing was done, there's no dispute

1 at the right stress-tested capacity.
 2 The decision on the pass or fail
 3 is the customer's decision. It's not a --
 4 there's not a set criteria. If it's not
 5 acceptable to the customer, then it's not
 6 passed. And if it is, it is.

7 Q. I'm trying to determine what you
 8 mean by the phrase, "before completing adequate
 9 testing." I didn't know if adequate testing
 10 described the testing protocol or whether it
 11 described the results.

12 A. Both.

13 Q. All right. And in this case,
 14 what testing -- what protocols do you believe
 15 were not followed that should have been
 16 followed for it to be deemed adequate testing?

17 A. There were certainly individuals
 18 that told Ms. Weissman that the amount of
 19 testing that they did was cursory. That
 20 wouldn't be adequate.

21 There was --

22 Q. Okay.

23 A. There were people who told
 24 Ms. Weissman, as I recall, that the volumes
 25 of -- of data and so forth that were tested

1 that whatever testing was done, there was never
 2 any stress testing at -- at anywhere near the
 3 volumes that the system would be called upon to
 4 support that produced passable results.

5 And so, I mean, it's up to the
 6 ultimate customer to accept the test results or
 7 not. In this case, the only knowledgeable
 8 employee of the customer said that the software
 9 flat-out did not perform adequately during the
 10 test.

11 So what I say is, it has to
 12 be -- it has to perform adequately in the test
 13 in the judgment of the -- of the customer.

14 Q. So when you define adequate
 15 testing, are you defining that as results that
 16 are acceptable to the customer?

17 A. Well, the adequate testing is
 18 testing of the functionality and testing of the
 19 performance at a stress testing level. And by
 20 that, I mean at the volumes of transactions and
 21 the volumes of data that the software would --
 22 will be called upon to perform once it's put
 23 into production use.

24 And that testing should include
 25 all of the needed functionality and should be

1 were minimal. That wouldn't be adequate.
 2 Now, Mr. Phillips disputes that.
 3 But even in that dispute, he said the results
 4 were so bad that the system, as it was tested,
 5 was not usable. And, therefore, he recommended
 6 to Mr. Reidl that Hodell not go live.

7 So not only from a procedural
 8 standpoint do you have to do adequate -- and by
 9 "adequate," I mean comprehensive -- testing of
 10 functionality, not only do you have to do
 11 stress testing, but you have to have a result
 12 that is satisfactory and will be satisfactory
 13 to the customer once the go-live occurs.

14 So it's both the process and the
 15 result.

16 Q. Sir, I was asking about the
 17 protocol, the process.

18 A. I think I just answered the --

19 Q. Now, my question is -- well,
 20 you've answered more than that. And I'm just
 21 trying to now limit this to the protocol.

22 Can we agree that the
 23 instructions of LSi to fully load the system
 24 with your -- a hundred percent of your people
 25 who you expect to have use it, using the data

1 that you expect them to have -- use, is a
 2 proper protocol?
 3 A. Yes.
 4 Q. Okay. And --
 5 A. It's part of a proper protocol.
 6 Q. Can you think of any other
 7 testing that you believe should have been done
 8 from a protocol standpoint for you to consider
 9 the testing to have been adequate from a
 10 protocol standpoint?

11 A. Had -- it would have to have
 12 been done with real data. It would have to
 13 have been done with the volume of data on the
 14 system that the system will ultimately need to
 15 support. And -- and it would have to be done
 16 with a number of concurrent users that the
 17 system will ultimately have to support.

18 There is a dispute between
 19 Mr. Phillips and Ms. Weissman, or there is
 20 contrasting testimony between the two of them,
 21 as to whether or to what level that was done.

22 Q. I didn't ask if there was a
 23 dispute.

24 My question was, what was the
 25 proper protocol? You also said in addition

1 information, but I just don't recall it today,
 2 as we sit here.

3 Q. Well, in regard to opinion
 4 number six then, are you focusing on and is
 5 that limited to the load testing?

6 A. It -- it -- I'm focused in
 7 opinion six on the user acceptance test, which
 8 occurs after the unit test and after the
 9 integration test. And then it's the portion of
 10 the testing that's done by the customer.

11 Q. And now -- now I'm going to get
 12 to the what's acceptable standard of adequate
 13 testing, the results standpoint.

14 A. Okay.

15 Q. If three people -- if three
 16 people at the customer's facility say it's
 17 acceptable and one says it is not, what's your
 18 opinion as to whether that was -- testing was
 19 acceptable?

20 A. It depends on the qualifications
 21 of the three people. If the one who says it's
 22 not is the one with the most expertise, then I
 23 would go with the one with the most expertise.

24 Q. Well, and if the performance
 25 issue is slowness -- okay?

1 to --
 2 A. I retract the last --
 3 Q. -- protocol testing, would
 4 require, also, unit testing.

5 What is unit testing?

6 A. Unit testing is where you test
 7 each of the individual functions of the
 8 software and determine that they're working
 9 properly.

10 Q. And in this case, when you say
 11 unit testing should have been done, are you
 12 referring to the software solution, meaning
 13 In-Flight, Radio Beacon and Business One?

14 A. Yes. And unit testing is
 15 typically done by the -- the implementer in a
 16 case like this.

17 Q. All right. And is that done --
 18 that can be done off site?

19 A. Yes.

20 Q. Okay. In this case, do you know
 21 whether unit testing was done?

22 A. I don't, off the top of my head,
 23 recall the evidence on the level of unit
 24 testing that was done.

25 I do believe I saw some

1 A. Yes.

2 Q. -- if that's the criteria that's
 3 being used, wouldn't you more readily rely upon
 4 the user as opposed to that person who had the
 5 most technical expertise?

6 A. You --

7 MR. STAR: Objection to form.

8 A. (Continuing) You'd have to look
 9 at the individual situation. But, in general,
 10 I would rely on -- well, certainly if the user
 11 was dissatisfied, I -- I -- I would think that
 12 that would be important information.

13 But if the user was satisfied,
 14 but the one with the most technical expertise
 15 has said, hey, this isn't adequate, I -- I
 16 would go with the one with the most -- the most
 17 technical expertise because they're -- they're
 18 the one -- that person or those persons, in
 19 some cases, would be the one with the most
 20 ability to generalize from individual
 21 experience into what would happen once the --
 22 the solution actually goes live in a production
 23 environment. Individual users --

24 BY MR. HULME:

25 Q. What's your --

1 A. -- can't do that generalization.
 2 Q. What's your opinion as to
 3 whether a development team has an obligation to
 4 report to its sales team inherent limitations
 5 in the product from a technical or functional
 6 standpoint?

7 MR. STAR: Objection to form.

8 A. I -- I think full transparency
 9 from development to marketing to sales is -- is
 10 good and important.

11 BY MR. HULME:

12 Q. And would you agree with me that
 13 it would fall below the standard of care for a
 14 development team not to communicate to its
 15 sales team inherent limitations in the product?

16 A. I mean, do you have a specific?

17 Q. Yes. That this thing probably
 18 won't work for companies with 120 users.

19 MR. STAR: Objection to form.

20 A. Well, if that were a fact, that
 21 would be something that probably should be
 22 communicated. But we know it's not a fact
 23 because Business One has numerous installations
 24 far in excess of 120 users.

25 BY MR. HULME:

1 Q. And if that was the opinion of
 2 the development team, that it would not be an
 3 appropriate program for a company with 120
 4 users, would you agree with me that it falls
 5 beneath the standard of care of a software
 6 developer not to report that to their sales
 7 team?

8 MR. STAR: Objection to form.

9 A. You -- you -- you've asked me
 10 for a hypothetical that's contrary to the known
 11 facts. And it's hard for me to -- to speculate
 12 on an answer that's contrary to the -- the
 13 known facts.

14 To the best of my knowledge,
 15 there were no -- there were concerns about
 16 scalability. And those were communicated. But
 17 they weren't hard and fast, no, it can't
 18 support 120 users. No, it can't support 200
 19 users. And, in fact, we know that it did -- it
 20 could and did support more than 120 and more
 21 than 200 users.

22 BY MR. HULME:

23 Q. Sir, you testified that
 24 your -- essentially a hundred percent of your
 25 time is devoted to being an expert witness in

1 litigation, correct?
 2 A. The vast majority, yeah.
 3 Q. All right. And in those years
 4 of being an expert witness in litigation, have
 5 you ever been asked a hypothetical question?

6 A. Yes.

7 Q. And have you ever answered that
 8 hypothetical question directly?

9 MR. STAR: Objection to form.

10 Argumentative.

11 A. I've answered hypothetical
 12 questions directly today. There are some
 13 hypothetical questions --

14 BY MR. HULME:

15 Q. You have not. You have always
 16 added -- you have always added that you don't
 17 believe the facts support such a hypothetical.
 18 You have always added the additional qualifier
 19 that you can't answer that question because it
 20 is not supported by the facts in this case.

21 That I want as a definition. I
 22 want you to assume that that is not a direct
 23 answer to a hypothetical. Okay? Can you
 24 assume that for me?

25 A. Yes.

1 MR. STAR: Wait a second. I
 2 object, Roy --

3 MR. HULME: Okay.

4 MR. STAR: I object, Roy, to you
 5 arguing with the witness. Just because
 6 your characterization of his testimony is
 7 one thing doesn't mean that's what it is.

8 He's answered your questions.
 9 He's answered hypotheticals that are put
 10 to him in a proper way by qualifying them
 11 to tell you what information is missing
 12 from the hypothetical.

13 When you give a very vague
 14 hypothetical, the witness is allowed to
 15 fill in the missing elements that qualify
 16 his answer appropriately.

17 Go ahead.

18 MR. HULME: Okay.

19 BY MR. HULME:

20 Q. What is the basis upon which SAP
 21 based statements that Business One was good for
 22 companies with 300 or 500 employees?

23 MR. STAR: Objection to form.

24 Outside the scope of his report. Lacks
 25 foundation.

1 Only answer if you know. Don't
 2 speculate. If that's not something you
 3 looked at, you can explain that.

4 A. I'm not sure I caught the whole
 5 question.

6 BY MR. HULME:

7 Q. My question is -- and maybe you
 8 don't know the answer to this -- upon what did
 9 SAP base statements that Business One was good
 10 for a company of 300 or 500 employees?

11 A. What's -

12 MR. STAR: Same objection.

13 A. (Continuing) What statements?
 14 I didn't see any statements of that nature.

15 BY MR. HULME:

16 Q. Okay. Have you seen any of the
 17 marketing literature of the SAP Business One?

18 A. Yes.

19 Q. Okay. And did you see any of
 20 that literature, do you have any recollection
 21 of it saying that this is appropriate for
 22 businesses of from three to 500 employees?

23 MR. STAR: Objection to form.

24 A. Oh, now you're talking
 25 employees, not -- not -- not concurrent users?

1 A. No.

2 Q. Well, then, why did you confuse
 3 it when I said "employees" every time and you
 4 heard me say "user"?

5 MR. STAR: He didn't.

6 MR. HULME: Read back the
 7 transcript, please, from when I started
 8 asking those questions.

9 MR. STAR: Ask him the question.
 10 Go ahead and answer it.

11 MR. HULME: I just did.

12 Will the court reporter please
 13 go back to when I first used the word
 14 "300" and read him my question.

15 - - -

16 (Whereupon, the court reporter
 17 read back the following:

18 "QUESTION: What is the basis
 19 upon which SAP based statements that
 20 Business One was good for companies with
 21 300 or 500 employees?"

22 - - -

23 MR. HULME: Go to the next time
 24 I said, "300 or 500."

25 - - -

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1 BY MR. HULME:

2 Q. I'm just asking you, what is the
 3 basis, if you know, of them expressing an
 4 opinion that this was appropriate for companies
 5 from 300 or 500 employees? Do you know what
 6 the basis of that was?

7 A. You've changed the premise on
 8 me. A minute ago, you were talking three to
 9 500 users, not three to 500 employees. And I'm
 10 just trying to get some clarification on that.

11 MR. STAR: He's referring to
 12 marketing documents that he's not showing
 13 you and he's asking you if you know what
 14 information SAP put into those documents,
 15 how it came up with that.

16 And if you hadn't looked at that
 17 and you don't know the answer, he's
 18 telling you, you can say you don't know.

19 But you can answer the question
 20 in the way that you understand it.

21 BY MR. HULME:

22 Q. And by the way, just so you
 23 know, would you agree with me it's easy to
 24 confuse the words "users" and "employees" when
 25 it comes to software?

1 (Whereupon, the court reporter
 2 read back the following:

3 "QUESTION: My question is --
 4 and maybe you don't know the answer to
 5 this -- upon what did SAP base statements
 6 that Business One was good for a company
 7 of 300 or 500 employees?"

8 "QUESTION: I'm just asking you,
 9 what is the basis, if you know, of them
 10 expressing an opinion that this was
 11 appropriate for companies from 300 or 500
 12 employees? Do you know what the basis of
 13 that was?"

14 - - -

15 A. Okay. I think I can explain why
 16 I was confused, and that's because all day,
 17 we've been talking about Hodell's insistence
 18 that it needed to support 200 to 500 users, and
 19 then you bring up the same number now in the
 20 same -- in a similar context.

21 I misheard it. Had I -- had I
 22 been evaluating it -- a written document -- and
 23 I will grant you that under the context of the
 24 questions you've asked me, it is easy to
 25 misstate that. But when you're looking at a

1 written document, and the written document says
 2 "employees," there's no confusion that that
 3 means employees and not users.

4 But we've been talking 300 to
 5 500 or 250 to 500 users for the last five
 6 hours. And this time you said "employees."
 7 And, quite frankly, I agree with you, I didn't
 8 catch it.

9 But had it been in a pre-sale
 10 situation and I saw it on marketing literature
 11 or had you shown me the marketing literature
 12 where it showed users, not employees, and I had
 13 read it, I wouldn't have misheard you.

14 They're two different things.

15 BY MR. HULME:

16 Q. What sense does it make in
 17 marketing literature to use the word
 18 "employees" when you're trying to sell
 19 software?

20 A. It's very common to use
 21 "employees," because that's the way companies
 22 think of themselves.

23 When you talk about -- to a
 24 company about how big they are, they tend to
 25 tell you number of employees and they tend to

1 A. Correct.

2 Q. Okay. Is it your understanding
 3 that LSi did not have a complete understanding
 4 of the transaction volume and other
 5 characteristics of what Hodell would need
 6 before they recommended Business One?

7 A. Well, we know from the project
 8 manager, Ms. Weissman, that they didn't have it
 9 as of the time of going live. So there's no --
 10 and there's no evidence that they had it at
 11 some time and lost it.

12 So since they didn't have that
 13 information at go-live time, the only -- and
 14 there's no contrary evidence, the only
 15 presumption I can make is that they -- they
 16 didn't have it from the outset.

17 Q. And so you're expressing your
 18 opinions in this case on the assumption that
 19 LSi did not understand the business, the
 20 transaction volume, that Hodell required in its
 21 normal business operations, correct?

22 A. The --

23 MR. STAR: Objection to form.

24 A. (Continuing) The project
 25 manager, Ms. Weissman, testified to that

1 tell you their annual volume.

2 And, in fact, in European
 3 economic community's definition of an SME, that
 4 also refers to employees or annual sales
 5 volume.

6 So that -- that's the way
 7 companies think of themselves.

8 Q. You testified that you last
 9 developed software in 1972, correct?

10 A. Correct.

11 Q. Your medium, did you use punch
 12 tapes or magnetic cards? What was the storage
 13 method of your development? Punch cards? What
 14 was it?

15 A. I think it was punch cards, for
 16 the most part.

17 Q. So the last time that you did
 18 any software development, the method of
 19 software development utilized punch cards?

20 A. That's correct. That's the way
 21 I did it on the Mariner and Surveyor space
 22 project. That's the way I did it on the
 23 Honeywell software development project. And
 24 that's the way I did it in the Coast Guard.

25 Q. Those were all before 1972?

1 effect. She's the key individual.

2 I'm -- I'm relying on -- not
 3 entirely, but certainly to a great extent, on
 4 her testimony.

5 BY MR. HULME:

6 Q. All right. And what did you
 7 understand Ms. Weissman's role to be, her
 8 duties and responsibilities?

9 A. She was, as I recall, the
 10 project manager for this development. She
 11 wasn't the -- the developer. That was
 12 Mr. Guaganti, I believe. And I believe his
 13 testimony was, he didn't have very much of that
 14 information either.

15 Q. That's your recollection,
 16 also --

17 A. Yes.

18 Q. -- is that correct?

19 A. Yes.

20 Q. So your opinions that LSi didn't
 21 have all the facts is based upon your
 22 recollection of Ms. Weissman's testimony and
 23 Mr. Joe Guaganti's testimony, correct?

24 A. Well, it's also based on the
 25 fact that there was no fit/gap and there was no

1 specification for what they were doing,
 2 where -- which would be the customary places
 3 where that sort of information would -- would
 4 be documented.

5 So the documentation that LSi
 6 should have had of that information was
 7 missing.

8 Q. Well, all you really care about
 9 is that you have the knowledge, correct?

10 A. No.

11 MR. STAR: Objection to form.

12 A. (Continuing) I don't agree.

13 BY MR. HULME:

14 Q. All right. Can we agree --

15 A. No. No matter how --

16 Q. -- that if --

17 A. No matter how much knowledge you
 18 have, you can't develop something properly
 19 unless you have the proper -- you've taken the
 20 proper steps, you've done the proper
 21 documentation to do the development.

22 And there's no indication that
 23 LSi had taken those steps or had that
 24 documentation.

25 Knowledge, in and of itself,

1 and read him testimony and tell him that
 2 he's wrong, you can do that. But don't
 3 interrupt him in the middle of answering
 4 a question.

5 You asked him what he
 6 understands and he's telling you.

7 MR. HULME: Well, then don't
 8 give any speaking objections, Greg. Then
 9 just say objection instead of doing
 10 speaking objections.

11 MR. STAR: You know what? It's
 12 more than an objection, Roy. You're
 13 interrupting the witness in the middle of
 14 a question that you asked because you
 15 don't like the answer.

16 So if you want to tell me that
 17 that's appropriate --

18 MR. HULME: I could care less --

19 MR. STAR: -- then go ahead.

20 MR. HULME: -- what his answers
 21 are.

22 MR. STAR: Pardon?

23 MR. HULME: All right.

24 MR. STAR: What did you say?

25 MR. HULME: I said I could care

1 isn't enough. You've got to document. Every
 2 single -- every single resource on development
 3 calls for documentation.

4 Q. So you're saying that because
 5 Ms. Weissman and Mr. Guagenti did not have a
 6 piece of paper that said what the generally
 7 accepted transaction volume would be, what the
 8 database size would be or what the user count
 9 would be, that's why you say LSi didn't know
 10 that information, correct?

11 MR. STAR: Objection to form.

12 A. I -- Ms. Weissman said LSi
 13 didn't know that. And --

14 MR. HULME: No. Excuse me.

15 A. (Continuing) And the
 16 evidence --

17 MR. STAR: Whoa, whoa, whoa,
 18 whoa, whoa.

19 Roy --

20 MR. HULME: Let me correct one
 21 thing before you go further.

22 Ms. Weissman said she didn't
 23 know that.

24 MR. STAR: No, no, no.

25 Look, if you want to show him

1 less what his answers are. I just want
 2 them --

3 MR. STAR: Good.

4 MR. HULME: -- down on the
 5 record.

6 MR. STAR: You know what? We're
 7 past our hard stop, so we're done. That
 8 concludes today. That concludes this
 9 deposition.

10 THE VIDEO TECHNICIAN: Off the
 11 record?

12 MR. HULME: Was that your --
 13 this does not conclude this deposition.

14 MR. STAR: It does.

15 MR. HULME: I will take his
 16 deposition further if I need to take his
 17 deposition further. And I do need to
 18 take his deposition further.

19 MR. STAR: You will not.

20 MR. HULME: And I'm ready,
 21 willing and able to continue and will.

22 MR. STAR: You will not. You're
 23 past your agreed time. We're done.
 24 He'll read and sign.

25 THE VIDEO TECHNICIAN: The time

1 now is 15:49. This concludes the
 2 deposition. End of tape four of four.
 3

4 MR. HULME: Excuse me. The
 5 record shall reflect this deposition is
 6 not concluded. That Mr. Star is walking
 7 out of the deposition with the witness.
 8

9 MR. STAR: No. The record will
 10 actually show we had an agreement to stop
 11 at 3:45 so the man can catch a flight,
 12 which you've already gone past. And look
 13 at your watch, Roy.
 14

15 MR. HULME: I told you what
 16 my --
 17

18 MR. STAR: Look at your watch.
 19

20 MR. HULME: -- suggestion was.
 21 Go ahead.
 22

23 MR. STAR: But where is your
 24 deposition notice? Serve a notice before
 25 you try to take a deposition.
 26

27 We're done.
 28

29 THE WITNESS: He said he doesn't
 30 care what I answer anyway.
 31

32 MR. STAR: Right. Exactly. He
 33 didn't care what you answered anyway, so
 34 why does he ask it.
 35

1 THE WITNESS: Yeah.
 2

3 MR. STAR: We're done.
 4

5 MR. HULME: As long as it's on
 6 the record, I don't care what your answer
 7 is.
 8

9 (Witness excused.)
 10

11 (Whereupon, the deposition was
 12 adjourned at 3:50 p.m.)
 13

1 C E R T I F I C A T E
 2

3 I, CHERYL L. GOLDFARB, a Notary
 4 Public, do hereby certify that the foregoing
 5 deposition of BROOKS LOUIS HILLIARD, was taken
 6 before me, pursuant to notice, at the time and
 7 place indicated; that said deponent was by me
 8 duly sworn to tell the truth, the whole truth,
 9 and nothing but the truth; that the testimony
 10 of said deponent was correctly recorded in
 11 machine shorthand by me, to the best of my
 12 ability, and thereafter transcribed under my
 13 supervision with computer-aided transcription;
 14 that the deposition is a true record of the
 15 testimony given by the witness; and that I am
 16 neither of counsel nor kin to any party in said
 17 action, nor interested in the outcome thereof.
 18

19 WITNESS my hand and official
 20 seal this 4th day of November, 2012.
 21

22
 23 CHERYL L. GOLDFARB, RPR
 24 Notary Public
 25

1 DEPOSITION REVIEW
 2 CERTIFICATION OF WITNESS

3 ASSIGNMENT NO: 1553425
 4 CASE NAME: Hodell-Natco Industries, Inc. v. SAP America, Inc.
 5 DATE OF DEPOSITION: 11/2/2012

6 WITNESS' NAME: Brooks Louis Hilliard, CMC, CCP
 7 In accordance with the Rules of Civil
 8 Procedure, I have read the entire transcript of
 9 my testimony or it has been read to me.
 10 I have made no changes to the testimony
 11 as transcribed by the court reporter.
 12

13 Date Brooks Louis Hilliard, CMC, CCP
 14 Sworn to and subscribed before me, a
 15 Notary Public in and for the State and County,
 16 the referenced witness did personally appear
 17 and acknowledge that:

18 They have read the transcript;
 19 They signed the foregoing Sworn
 20 Statement; and
 21 Their execution of this Statement is of
 22 their free act and deed.
 23

24 I have affixed my name and official seal
 25 this _____ day of _____, 20 _____.
 26

27 Notary Public
 28

29 Commission Expiration Date
 30
 31
 32
 33
 34
 35

1 DEPOSITION REVIEW
2 CERTIFICATION OF WITNESS

3 ASSIGNMENT NO: 1553425
4 CASE NAME: Hodell-Natco Industries, Inc. v. SAP America, Inc.
5 DATE OF DEPOSITION: 11/2/2012

6 WITNESS' NAME: Brooks Louis Hilliard, CMC, CCP

7 In accordance with the Rules of Civil
8 Procedure, I have read the entire transcript of
9 my testimony or it has been read to me.

10 I have listed my changes on the attached
11 Errata Sheet, listing page and line numbers as
12 well as the reason(s) for the change(s).

13 I request that these changes be entered
14 as part of the record of my testimony.

15 I have executed the Errata Sheet, as well
16 as this Certificate, and request and authorize
17 that both be appended to the transcript of my
18 testimony and be incorporated therein.

19 Date Brooks Louis Hilliard, CMC, CCP

20 Sworn to and subscribed before me, a
21 Notary Public in and for the State and County,
22 the referenced witness did personally appear
23 and acknowledge that:

24 They have read the transcript;
25 They have listed all of their corrections
in the appended Errata Sheet;
They signed the foregoing Sworn
Statement; and
Their execution of this Statement is of
their free act and deed.
I have affixed my name and official seal
this day of , 20 .

26 Notary Public

27 Commission Expiration Date

1 ERRATA SHEET

2 RENNILLO DEPOSITION & DISCOVERY - A VERITEXT COMPANY

3 ASSIGNMENT NO: 1553425

4 PAGE/LINE(S) / CHANGE /REASON

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20 Date Brooks Louis Hilliard, CMC, CCP
21 SUBSCRIBED AND SWORN TO BEFORE ME THIS
22 DAY OF , 20 .

23 Notary Public

24 Commission Expiration Date

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C E R T I F I C A T E

4 I do hereby certify that I am a Notary
5 Public in good standing, that the aforesaid
6 testimony was taken before me, pursuant to
7 notice, at the time and place indicated; that
8 said deponent was by me duly sworn to tell
9 the truth, the whole truth, and nothing but
10 the truth; that the testimony of said
11 deponent was correctly recorded in machine
12 shorthand by me and thereafter transcribed
13 under my supervision with computer-aided
14 transcription; that the deposition is a true
15 and correct record of the testimony given by
16 the witness; and that I am neither of counsel
17 nor kin to any party in said action, nor
18 interested in the outcome thereof.

19

20 WITNESS my hand and official seal this
21 7th day of NOV., 2012.

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Cheryl L. Galloway

25 Notary Public

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